

No. 14334

United States
Court of Appeals
for the Ninth Circuit

CLERK OF COURT

CHARLES B. SMITH, as Special Administrator
of the Estate of Edward S. Birn, Deceased,
Appellant,

vs.

MILTON SPERLING, HARRY M. WARNER,
JACK L. WARNER, UNITED STATES
PICTURES, INC., and WARNER BROS.
PICTURES, INC., Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 292, inclusive)

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

NOV 30 1954

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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OLIVER B. SCHWAB,

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Beverly Hills, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

No. 9005-WM

EDWARD S. BIRN, Plaintiff,

vs.

MILTON SPERLING, HARRY M. WARNER,
JACK L. WARNER, UNITED STATES
PICTURES, INC., and WARNER BROS.
PICTURES, INC., Defendants.

COMPLAINT

Accounting and Damages

Plaintiff herein suing derivatively on behalf of and for the benefit of defendant Warner Bros. Pictures, Inc., and the stockholders thereof, complains as follows: (All of the allegations below being upon information and belief except allegations "1" to "4" inclusive and allegation "20", which are alleged as of plaintiff's knowledge.)

For a First Cause of Action Against All The Defendants

1. Jurisdiction herein is founded on diversity of citizenship and amount. This action is not a collusive one to confer on this court jurisdiction of an action over which it would not otherwise have jurisdiction.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.

3. Plaintiff is a citizen of the State of New York. [2]

4. Plaintiff is, and has been, during the time that the transactions herein complained of occurred, the owner of 400 shares of capital stock of defendant Warner Bros. Pictures, Inc., having owned said stock since August 21st, 1944.

5. Defendants Warner Bros. Pictures, Inc., (hereinafter referred to as Warner Bros.) and United States Pictures, Inc. (hereinafter referred to as United) are corporations incorporated under the laws of the State of Delaware, engaged in the motion picture business and said corporations do business and maintain offices in the County of Los Angeles and State of California.

6. The defendants Milton Sperling, Harry M. Warner, and Jack L. Warner are citizens of the State of California.

7. That during the time that the transactions hereinbelow complained of occurred, the defendants, Harry M. Warner, Jack L. Warner, were directors of Warner Bros.

8. That the Board of Directors of defendant Warner Bros., presently consists of defendants Harry M. Warner, Jack L. Warner, Morris Wolf and of John E. Bierwirth, Robert W. Perkins, Samuel Carlisle, Waddill Catchings, Stanleigh P. Friedman, Charles S. Guggenheimer, Samuel Schneider and Albert Warner.

9. That the aforementioned Harry M. Warner, Jack L. Warner and Albert Warner are brothers and the aforesaid Milton Sperling is the son-in-law of Harry M. Warner.

10. That at all times herein mentioned the de-

fendants Harry M. Warner and Jack L. Warner, together with their brother, Albert Warner owned a large and controlling block of the outstanding capital stock of Warner Bros. and said three brothers did control and dominate Warner Bros. and did actively direct its supervision, policies, actions and business including the acts hereinafter alleged in this complaint and did actually select, dominate and control the directors and officers of Warner Bros.

11. That in or about or prior to the summer of 1945 the [3] individual defendants did, as is hereinbelow more fully alleged, illegally, wrongfully and in bad faith, conspire and act together to waste, mismanage, divert and misappropriate the assets and business opportunities of Warner Bros. in favor of, and to further and enrich the private interests of defendant Sperling and United at the expense of Warner Bros., and the different things and acts done by said individual defendants, and by the corporate defendants through their directors and officers, as hereinbelow alleged, were all steps in said conspiracy and were committed pursuant thereto.

12. That on or about August 6th, 1945, defendant United was caused to be organized by defendant Sperling with nominal capital contributions and the capital stock of said corporation was issued to Sperling and one other. That since September, 1946, defendant Sperling has been the sole stockholder of defendant United.

13. That said corporation was organized in order

that through it, the defendant Sperling might wrongfully utilize and divert from Warner Bros. the funds, credits, facilities, assets and business opportunities of Warner for his private purposes and benefits.

14. Thereafter and in or about September, 1945, the defendants caused Warner Bros. and United to enter into an agreement which provided in substance as follows:

Six motion pictures were to be produced by United at the studio, and with the facilities and personnel of, Warner Brothers. Said pictures were to be distributed by Warner Bros. through its subsidiaries, the latter to retain out of the gross proceeds of distribution certain percentages and sums as fees and expenses of distribution and the net profits from the production and distribution of said pictures were to be shared equally between Warner Bros. and United.

Warner Bros. was to advance 50% of the cost of production of said pictures and the remaining 50% of said cost was to be advanced by United. In this latter connection, however, United was authorized to borrow its entire share of the cost of production and [4] was further authorized to pledge as security for such borrowing, the pictures to be produced, including the negatives and positive prints thereof and including the entire net proceeds of the distribution of said pictures, and Warner Bros. was to agree to such pledge and thereby subordinate its investment and provide with its funds the collateral security for the loan to United.

15. That at the time of the making of said agreement, it was intended by defendants that United was not to advance any of its private funds or capital in the performance of said agreement and that United was to meet its share of the cost of production of said six motion pictures by means of the borrowing privileges set forth in said agreement.

16. That in furtherance of said agreement and intention as set forth in the two preceding paragraphs and in or about November 1945, the defendants caused an agreement to be entered into between Warner Bros. and United and The New York Trust Company (the latter being a New York banking corporation) for the loan by The New York Trust Company to United, of the latter's share of the cost of production of the pictures as aforesaid and under said agreement there was pledged as security for the repayment of said loans the security described in allegation "14" hereinabove; and said loan agreement further provided that after said loans had been repaid and after the share of the production costs of the pictures advanced by Warner Bros. had likewise been repaid, the net profits resulting from the pictures were to be shared equally between Warner Bros. and United.

17. That said loan agreement was effectuated through the use of the valuable credit and banking facilities and connections of Warner Bros. in that John E. Bierwirth, a director of Warner Bros., is and has been president of The New York Trust Company since 1941, and his influence was used to

effect said loan agreement, and further, in that Warner Bros. is a valued customer of The New York Trust Company and its patronage is favorably sought for various [5] reasons including the fact that Warner Bros. was then indebted to a syndicate of banks, including The New York Trust Company, to the extent of several million dollars.

18. That in pursuance of said agreements as alleged in paragraphs numbered "14" and "16" above and during the period commencing in or about November 1945 to date, United has borrowed large sums from The New York Trust Company and the funds, credits, facilities, assets and business opportunities of Warner Bros. were and still are being used by United, and the said agreements have been in part performed and motion pictures are being produced and distributed under said agreements and said agreements remain in part unperformed.

19. That in connection with the performance of said agreements United has not advanced any of its private funds or capital and has contributed to the costs of production of said pictures solely out of the loans from The New York Trust Company aforementioned.

20. That plaintiff did not discover the facts set forth in allegations "11" to "19" inclusive herein until October of 1948 and plaintiff had no notice or information of circumstances which would put him on inquiry regarding such facts until October of 1948.

21. That by reason of the premises, Warner Bros. has suffered and still suffers improper and illegal

waste, mismanagement, misappropriation and diversion of its valuable assets, credits, facilities and business opportunities all to its loss and to the improper and personal profit and benefit of United, and Sperling in that;

(a) The aforesaid agreements and the amount of return or profit provided thereunder to Warner Bros. and the amount of distribution fees provided thereunder to its subsidiaries are grossly unreasonable and unfair to Warner Bros. and its subsidiaries and are not in accordance with customary agreements in the motion picture industry; and
(b) Warner Bros., in effect, has been and still is providing the use of its funds, credits, facilities and assets to [6] defendant United without any adequate, reasonable or legal consideration, return, or payment to Warner Bros.; and

(c) Warner Bros. in effect, has been and still is undertaking the sole risk of capital and bearing the entire burden of the cost of production of said motion pictures involved in the aforesaid agreement, and in the event of loss in said productions, Warner Bros. will suffer the entire or principal amount thereof inasmuch as United has advanced no capital and is financially unable to meet or share any substantial losses; and despite the foregoing Warner Bros. receives only 50% of the net profits and the other 50% of the said profits goes to United, such profit divisions being grossly unfair to Warner Bros. and the receipt by United of said profits and benefits under said agreements constitutes an im-

proper and unconscionable gift or advantage to United at the expense of Warner Bros.; and

(d) The subordination and use of the capital assets and facilities of Warner Bros. in favor of, and as collateral security for, the aforesaid loans to United, constitutes an improper or illegal use of property of Warner Bros. for which the latter receives in return no legal or adequate consideration; and

(e) The subordination and use of the capital, assets and facilities of Warner Bros. in favor of, and as collateral security for, the aforesaid loans to United, constitutes a breach of the existing written agreement between Warner Bros. and a syndicate of banks under which Warner Bros. is the recipient of large business loans totalling several millions of dollars, and the said last named written agreement with said banks prohibits such use of the capital and assets of Warner Bros., and thereby Warner Bros. is endangering said loans and injuring its credit. [7]

22. That all of the acts and matters alleged in this complaint were then known or with the exercise of reasonable diligence should have been then known to the defendants, and all of the defendants either actively participated in said acts or matters or with knowledge of the same and the course of conduct being pursued, ratified said acts or matters or failed to take any corrective measures.

23. That by reason of the premises, the defendant United and its assets, and the profits and benefits derived by it under the above mentioned agree-

ments, are substantially based upon, result from, and stand in the place of, the assets and business opportunities wrongfully diverted from Warner Bros. to United and hence the capital stock of United and all of its said assets belong in equity and good conscience to Warner Bros.

24. Demand upon the directors of Warner Bros. to institute this action would be futile and plaintiff has made no such demand because all or a majority of the present board of directors and officers of said corporation wrongfully participated in the acts and grievances herein complained of and said board of directors is controlled by the active wrongdoers herein, and since those to whom application would have to be made to institute this suit are the same persons who wrongfully caused or permitted the grievances herein complained of, such persons would refuse to bring suit against themselves and in fact would be disqualified from faithfully doing so.

25. Plaintiff has no adequate remedy at law and he and stockholders similarly situated and Warner Bros. will suffer irreparable damage unless the relief requested herein be granted.

For a Second Cause of Action Against All Defendants Except United and Sperling.

26. Repeats and realleges each and every allegation contained in paragraphs above numbered "1" to "25" (except "11") inclusive with the same force and effect as though herein alleged. [8]

27. That by reason of the acts committed by these defendants as herein alleged, the individual defend-

ants, while acting in their fiduciary capacities and while charged with their fiduciary duties as directors, have violated said duties and have failed and neglected to providently and prudently perform their said duties and have been guilty of culpable misfeasance, nonfeasance, mismanagement, negligence, waste and dissipation of assets of Warner Bros., all of which has been to the large pecuniary loss of Warner Bros.

For a Third Cause of Action Against All Defendants Except United and Sperling.

28. Repeats and realleges each and every allegation contained in paragraphs above numbered "1" to "10" inclusive and "24" and "25" with the same force and effect as though herein alleged.

29. That heretofore and prior to December 8, 1942, defendants caused Warner Bros., in conspiracy and concert with other large motion picture producing and distributing companies, to illegally and wrongfully combine and monopolize the distribution by Warner Bros. and certain of its subsidiaries, of motion picture in the city of Philadelphia, state of Pennsylvania, in restraint of trade and in violation of the laws of the United States, known as the Sherman Anti-Trust Act (15 U.S.C.A.1) and the Clayton Act (15 U.S.C.A. 15).

30. That thereupon on December 8, 1952, William Goldman Theatres, Inc., a corporation engaged in business as a motion picture distributor and exhibitor in Philadelphia, claiming to be aggrieved by said monopoly, brought suit in the United States

District Court for the Eastern District of Pennsylvania against Warner Bros. and its said subsidiaries and said other motion picture companies, which suit was entitled William Goldman Theatres, Inc., vs. Loews, Inc., and in which suit the plaintiff therein sought to enjoin said monopolistic practices and to recover from the defendants therein triple the damages suffered by said plaintiff as the result of said practices. [9]

31. That said suit terminated on December 8, 1946, in a judgment for the plaintiff therein which judgment decreed that the defendants in that suit were all guilty of illegal monopoly in violation of the Sherman Anti-Trust Act and which judgment enjoined said defendants from monopolistic practices and awarded to the plaintiff therein treble damages amounting to \$375,000, plus \$60,000 for said plaintiff's counsel fees. Said judgment was affirmed by the United States Circuit Court of Appeals on January 6th, 1948, and certiorari was denied by the United States Supreme Court on May 3, 1948. That said total award of \$435,000 was thereafter paid by said defendants to said plaintiff on or about May 23, 1948.

32. That subsequently said plaintiff's counsel obtained from said United States District Court an additional allowance against said defendants of \$15,000 for additional legal services in said lawsuit, which additional counsel fee allowance was paid by said defendants.

33. That of the said total amount of \$450,000 paid to William Goldman Theatres, Inc., and its

counsel, by the defendants in the said lawsuit, Warner Bros. and its subsidiaries contributed a large, if not a major aliquot share amounting to several thousands of dollars.

34. In connection with said lawsuit, Warner Bros. and its subsidiaries also suffered and paid out many thousands of dollars in counsel fees and expenses incurred by them in the defense of said action.

35. That the acts of Warner Bros. and its subsidiaries through their officers, agents and employees, upon which the aforesaid judgment was based, were in violation of the aforesaid laws of the United States and were against public policy.

36. That said acts of Warner Bros. and its subsidiaries were caused to be committed by the individual defendants herein as directors of Warner Bros. although said defendants then knew or [10] with the exercise of reasonable diligence should have then known that said acts were in violation of said law.

37. That the individual defendants willfully or negligently actively participated in causing Warner Bros. and its subsidiaries to perform the aforesaid acts or else with knowledge of the course of conduct being pursued ratified said acts and failed to take corrective measures.

38. That if not for the negligence or willful acts of defendants as aforesaid Warner Bros. would not have engaged in said illegal acts and would not have been subject to the aforesaid lawsuit and

would not have been obliged to pay out the large sums of money as aforesaid.

39. That by reason of the acts committed by these defendants as herein alleged, the individual defendants, while acting in their fiduciary capacities and while charged with their fiduciary duties as directors, have violated said duties and have failed and neglected to providently and prudently perform their said duties and have been guilty of culpable misfeasance, non-feasance, mismanagement, negligence, waste and dissipation of assets of Warner Bros., all of which has been to the large pecuniary loss of Warner Bros.

Wherefore plaintiff demands judgment as follows:

(1) That the defendants account to Warner Bros. for all losses and damages suffered by it and its subsidiaries and for all profits and benefits received by said defendants, and that defendants make restitution accordingly.

(2) That a trust be impressed upon the capital stock and assets of United in favor of Warner Bros.

(3) That the agreement between Warner Bros. and United to the extent that the same is unexecuted and to the extent that it is practicable to do so, should be cancelled and terminated.

(4) That plaintiff be allowed the costs, disbursements and expenses of this action, including reasonable counsel and accountants' [11] fees.

(5) That such other and further relief be granted as shall be equitable in the premises.

SIDNEY A. MOSS,
GEORGE C. LYON,
/s/ By SIDNEY A. MOSS,
Attorneys for Plaintiff. [12]

Duly Verified. [13]

[Endorsed]: Filed December 15, 1948.

[Title of District Court and Cause.]

ANSWER BY DEFENDANTS SPERLING AND
UNITED STATES PICTURES, INC.

Defendant Milton Sperling and defendant United States Pictures, Inc., in answer to the complaint herein for themselves only, state:

First Cause of Action.

1. Said defendants deny each and every allegation contained in Paragraphs 2, 11, 13, 15, 19, 21, 21(a), 21(b), 21(c), 21(d), 21(e), 22, 23 and 25 of the complaint.

2. Said defendants are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs 3, 4, 8, 10, 20 and 24 of the complaint.

3. Said defendants deny the allegations contained in Paragraph 12 of the complaint, except that they admit that United States Pictures, Inc. was organized on or about August 6, 1945.

4. Said defendants deny the allegations contained

in Paragraph 14 of the complaint except that they admit that on or about September 28, [14] 1945, the defendant Warner Bros. Pictures, Inc. and defendant United States Pictures, Inc. entered into a written agreement concerning the production by United States Pictures, Inc. of motion pictures, to which agreement the Court is respectfully referred for the true terms, provisions and conditions thereof.

5. Said defendants deny the allegations contained in Paragraph 16 of the complaint except that they admit that in or about November, 1945, a written agreement was entered into between defendant Warner Bros. Pictures, Inc., defendant United States Pictures, Inc. and The New York Trust Company concerning loans by the latter to United States Pictures, Inc. for use in producing motion pictures, to which agreement the Court is respectfully referred for the true terms, provisions and conditions thereof.

6. Said defendants deny the allegations contained in Paragraph 17 of the complaint except that they admit that John E. Bierwirth has been president of The New York Trust Company for some period of time.

7. Said defendants deny the allegations contained in Paragraph 18 of the complaint except that they admit that defendant United States Pictures, Inc. has borrowed sums of money from The New York Trust Company and that the agreements referred to in the foregoing paragraphs 5 and 4 of this Answer have been in part performed, that mo-

tion pictures are being produced and distributed under said agreements and said agreements remain in part unperformed.

Second Cause of Action

8. Said defendants repeat and reallege each and every allegation contained in Paragraphs 1 to 7 above by way of answer to Paragraph 26 of the complaint.

9. Upon information and belief, said defendants deny the allegations contained in Paragraph 27 of the complaint.

Affirmative Defense to First and Second Causes of Action.

10. Each said cause of action did not accrue within three years before the commencement of this action and that said action is barred. [15]

Second Affirmative Defense to First and Second Causes of Action.

11. Each said cause of action did not accrue within three years before the commencement of this action and that said action is barred by the New York Statute of Limitations.

Third Affirmative Defense to First and Second Causes of Action

12. The causes of action set forth in the complaint did not accrue within two years before the commencement of this action and that said action is barred by the California Statute of Limitations.

Fourth Affirmative Defense to First and Second
Causes of Action.

13. Each said cause of action did not accrue within three years before the commencement of this action and that said action is barred by the California Statute of Limitations.

Fifth Affirmative Defense to First and Second
Causes of Action.

14. Each said cause of action did not occur within three years before the commencement of this action and that said action is barred by the Delaware Statute of Limitations.

Sixth Affirmative Defense to First and Second
Causes of Action.

15. The complaint fails to set forth with particularity the efforts of the plaintiff to secure from the managing directors or stockholders of the defendant Warner Bros. Pictures, Inc. such action as plaintiff desires and the reasons for his failure to obtain such action or the reasons for not making such effort. Such reasons as plaintiff does allege in Paragraph 24 of the complaint are insufficient to excuse efforts by the plaintiff to secure from the directors and shareholders of Warner Bros. Pictures, Inc. such action as plaintiff desires. [16]

Seventh Affirmative Defense to First and Second
Causes of Action.

16. Both the First and Second Cause of Action of the complaint fail to state a claim against defendant United States Pictures, Inc. or defendant Milton Sperling, upon which relief can be granted.

Wherefore defendant United States Pictures, Inc. and defendant Milton Sperling demand that the First and Second Causes of Action of the complaint herein be dismissed and that they have their costs and disbursements in this action.

OLIVER B. SCHWAB and
ARTHUR LIVINGSTON,

/s/ By OLIVER B. SCHWAB,
Attorneys for Defendants United States Pictures,
Inc. and Milton Sperling. [17]

[Endorsed]: Filed April 1, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS HARRY M.
WARNER, JACK L. WARNER, AND WAR-
NER BROS. PICTURES, INC.

Come now the defendants, Harry M. Warner, Jack L. Warner, and Warner Bros. Pictures, Inc., and answer the complaint herein as follows:

As to the Alleged First Cause of Action

1. Upon information and belief, deny each and every allegation contained in paragraphs 2, 12, 15, 19 and 25 of the complaint.

2. Deny having any knowledge or information sufficient to form a belief concerning the truth of any allegations contained in paragraphs 3, 4, and 20 of the complaint.

3. Deny each and every allegation in paragraph 10 of the complaint except that they admit that at

all the times mentioned in the complaint, Harry M. Warner and Jack L. Warner, together with their brother, Albert Warner, owned shares of the outstanding capital stock of Warner Bros. Pictures, Inc.

4. Deny each and every allegation contained in paragraphs [18] 11, 13, 21, 21(a), (b), (c), (d), (e), 22 and 23 of the complaint.

5. Upon information and belief deny each and every allegation contained in paragraph 14 of the complaint except that they admit that in or about September 1945, Warner Bros. Pictures, Inc. entered into an agreement with United States Pictures, Inc., to which agreement the Court is respectively referred for the true terms, provisions and conditions thereof.

6. Upon information and belief deny each and every allegation contained in paragraph 16 of the complaint, except that they admit that in or about November 1945, an agreement was entered into between Warner Bros. Pictures, Inc., United States Pictures, Inc., and The New York Trust Company, and respectfully refer the Court to said agreement for the true terms and conditions thereof.

7. Upon information and belief deny each and every allegation contained in paragraph 17 of the complaint, except that they admit that John E. Bierwirth, a Director of Warner Bros. Pictures, Inc., is and has been for several years President of the New York Trust Company, but deny having any knowledge or information concerning the exact period of his incumbency.

As and for a Complete Defense to the Alleged First and Second Causes of Action, the Defendants Allege:

17. That each said cause of action stated in the complaint did not accrue within three years before the commencement of the action, and that said action is barred by the California Statute of Limitations.

As and for a Complete Defense to the Alleged Third Cause of Action, the Defendants Allege:

18. That the cause of action stated in the complaint did not accrue within three years before the commencement of the action and that said action is barred by the California Statute of Limitations.

As a Second Complete Defense to the Alleged Third Cause of Action, the Defendants Allege:

19. That the cause of action stated in the complaint did not accrue within six years before the commencement of the action and that said action is barred by the applicable Statute of Limitations of the State of Pennsylvania.

As and for a First Complete Defense to All Alleged Causes of Action These Answering Defendants Allege:

20. That each of said causes of action stated in the complaint did not accrue within three years before the commencement of the action and said action

is barred by the applicable Statute of Limitations of the State of New York. [21]

As and for a Second Complete Defense to All Alleged Causes of Action These Answering Defendants Allege:

21. That each said cause of action stated in the complaint did not accrue within three years before the commencement of the action, and that said action is barred by the applicable Statute of Limitations of the State of Delaware.

As and for a Third Complete Defense to All Alleged Causes of Action These Answering Defendants Allege:

22. That the complaint fails to comply with rule 23(b) of the Federal Rules of Civil Procedure and particularly the provision thereof which requires the complaint to set forth with particularity the efforts of the plaintiff to secure from the managing directors of the corporation and from the stockholders thereof such action as he desires and the reasons for his failure to obtain such action or the reason for not making such effort.

As and for a Fourth Complete Defense to All Alleged Causes of Action These Answering Defendants Allege:

23. That the complaint fails to state a claim against the defendants, upon which relief can be granted.

Wherefore, the defendants demand judgment that the complaint herein be dismissed with costs and disbursements of this action.

FRESTON & FILES and
EUGENE D. WILLIAMS,
/s/ By EUGENE D. WILLIAMS,
Attorneys for Harry M. Warner, Jack L. Warner,
Warner Bros. Pictures, Inc. [22]

Acknowledgment of Service attached. [23]

[Endorsed]: Filed April 4, 1949.

[Title of District Court and Cause.]

STIPULATION OF FACTS

The following Stipulation of Facts is entered into by and between all of the parties to the above entitled action, by and through their respective counsel, for the purposes of this action only, and upon the understanding that each party reserves the right to object to the relevancy, materiality, or competency of any of said facts, and upon the further understanding that said facts so stipulated are not all of the facts expected to be offered in evidence, and each party reserves the right to offer any part or parts of this Stipulation, and also such evidence as it desires in addition to the hereinafter stipulated facts and for the purpose of establishing or disproving any and all other facts in issue which are not stipulated: [24]

1. Plaintiff Edward S. Birn is now and at all times relevant to this proceeding has been a resi-

dent of the State of New York and is now and has been, since August 21, 1944, the owner of 400 shares of capital stock of defendant Warner Bros. Pictures, Inc., a Delaware Corporation hereinafter referred to as "Warner Bros."

2. The following persons were directors of Warner Bros. during the period stated after their respective names: Harry M. Warner, 1923 to date; Jack L. Warner, 1923 to date; Albert Warner, 1923 to date; Waddill Catchings, 1925 to date; Morris Wolf, 1929 to date; Stanleigh P. Friedman, 1931 to date; Charles S. Guggenheimer, 1932 to date; Samuel Carlisle, 1934 to date; Robert W. Perkins, 1936 to date; Samuel Schneider, 1944 to date; Joseph Bernhard, 1936 to Sept. 10, 1945; John E. Bierwirth, Nov. 23, 1945, to date. During the period January 1, 1945, to September 10, 1945, the Board of Directors of Warner Bros. consisted of all the above named persons, except John E. Bierwirth; from September 10, 1945, to November 23, 1945, neither Joseph Bernhard nor John E. Bierwirth was a member of said Board. On and after November 23, 1945, to date, the Board of Directors of Warner Bros. consisted of all of the above named persons, except Joseph Bernhard.

3. During the year 1945 Harry M. Warner held 150,000 shares, Jack L. Warner held 208,800 shares, and their brother Albert Warner held 210,000 shares of the common capital stock of Warner Bros. There were outstanding during that time after deducting shares held in the Treasury about 3,701,-

090 shares of common stock. [25] During that time Harry M. Warner, Jack L. Warner, and Albert Warner owned approximately 15% of the issued and outstanding common stock, and thereafter continued to own approximately this percentage during all times relevant to these proceedings.

4. On August 4, 1945, United States Pictures, Inc., hereinafter called "United", was organized as a Delaware Corporation. On September 4, 1945, defendant Milton Sperling paid into United the sum of \$12,500 and received 125 shares of its capital stock which were issued to him on September 6, 1945. On September 4, 1945, Joseph Bernhard paid into United the sum of \$12,500 and received 125 shares of its capital stock which were issued to him on September 6, 1945. From September 6, 1945, to September 18, 1946, Milton Sperling and Joseph Bernhard each held 125 shares of capital stock of United and were, during such period of time, the holders of all of the issued and outstanding shares of United. On September 18, 1946, Milton Sperling acquired the 125 shares theretofore standing in the name of Joseph Bernhard. On December 23, 1946, said certificate for 125 shares was cancelled and a certificate for 63 of said shares was issued to Milton Sperling, which shares he has held since then (in addition to the 125 shares originally held by him), and 62 shares were issued to Title Insurance & Trust Co., Los Angeles, as trustee. The ownership of the issued and outstanding shares in United has remained the same from that date to the present time.

5. Warner Bros. and United entered into the following written agreements:

(a) Basic Agreement dated September 28, 1945;
(b) Amendment to Basic Agreement dated November 2, 1945;

(c) Amendment to Basic Agreement dated May 20, 1946;

(d) Supplement and Amendment to Basic Agreement dated December 6, 1947;

(e) Amendment to Basic and Supplemental Agreement dated [26] December 9, 1947;

(f) Amendment to Basic and Supplemental Agreement dated February 3, 1948;

(g) Amendment to Basic and Supplemental Agreement dated July 21, 1950.

There will be submitted to the Court photostat copies of each of these agreements which may be received by the Court with the same force and effect as if they were the original signed copies of these agreements. The officers signing each of the above documents were duly elected and qualified officers of the corporation on behalf of which each signed.

6. United, Warner Bros., and the New York Trust Co., a New York banking corporation, entered into the following written agreements in which each of the three was a party thereto:

Agreement dated October 31, 1945;

Agreement dated July 20, 1946, amending in part the agreement of October 31, 1945:

Amendment dated February 25, 1948, to agreement dated October 31, 1945.

Photostat copies of these agreements will be pre-

sented to the Court and may be received by the Court with the same force and effect as if they were original signed copies of these agreements. The officers signing each of the above documents were duly elected and qualified officers of the corporation on behalf of which each signed.

7. The following agreements between United and Warner Bros. were approved by the Board of Directors of Warner Bros.:

The Basic Agreement dated September 28, 1945;

The Amendment thereto dated November 2, 1945;

The Amendment to the Basic Agreement dated May 20, 1946;

The Amendment to the Basic Agreement dated December 6, 1947;

The Amendment to the Basic Agreement dated July 21, 1950. [27]

There will be submitted to the Court copies of portions of Minutes of the Board of Directors' meetings of Warner Bros. held September 25, 1945, September 28, 1945, November 23, 1945, June 18, 1946, and August 17, 1950, which may be received by the Court with the same force and effect as if they were originals. Other than above referred to there are no minutes of directors' meetings of defendant Warner Bros. Pictures, Inc., for the period January 1, 1945, to date, pertaining to agreements, relations and understandings between Warner Bros. Pictures, Inc., and United States Pictures, Inc.

8. That on or about January 10, 1946, and prior to the annual stockholders' meeting of Warner

Bros., held on February 19, 1946, there was mailed to each and every stockholder of record of Warner Bros. a notice of said meeting accompanied by a proxy statement, a form of proxy, and an annual report of said company dated August 31, 1945: That copies of said documents have been submitted to counsel for all parties, and copies thereof may be introduced without further identification or foundation.

There are no minutes of stockholders' meetings of defendant Warner Bros. for the period January 1, 1945, to February 27, 1950, pertaining to agreements, relations, and understandings between Warner Bros. Pictures, Inc., and United States Pictures, Inc.

9. There will be submitted to the Court copies of portions of Minutes of the Board of Directors' meetings of United held August 31, 1945, October 4, 1945, November 2, 1945, July 9, 1946, and stockholders' meetings held July 9, 1946, July 23, 1947, July 13, 1948, July 12, 1949, and July 11, 1950, which may be received by the Court with the same force and effect as if they were originals. Other than the above referred to, there are no minutes of Directors' meetings of defendant United for the period January 1, 1945, to date, pertaining to agreements, relations and understandings between Warner Bros. and United and no minutes [28] of stockholders' meetings of defendant United for the period January 1, 1945, to date, pertaining to agreements, relations and understandings between Warner Bros. and United.

10. On July 1, 1943, Warner Bros. entered into a loan agreement with the First National Bank of Boston, the New York Trust Co., Guarantee Trust Company of New York, Continental Illinois National Bank & Trust Company of Chicago, Pennsylvania Company for Insurance on Lives and Granting Annuities, the Union Trust Company of Pittsburgh, covering a loan of fifteen million dollars maturing in various amounts on various dates ending June 1, 1949. This loan was paid off in full by June 28, 1945. A photostat copy of this loan agreement will be presented to the Court, which may be received by the Court with the same force and effect as if it were an original, duly executed copy of said loan agreement.

As of June 28, 1945, Warner Bros. entered into another loan agreement, which loan agreement was incorporated in nine promissory notes of Warner Bros., all dated June 28, 1945, payable respectively to the following banks in the following amounts:

Banks	Amount
New York Trust Company.....	\$ 2,297,297.00
Guaranty Trust Co.	3,445,946.00
First National Bank—Boston	2,756,757.00
Continental Illinois Nat. Bank.....	2,756,757.00
Union Trust Company Pittsburgh	2,756,757.00
The Pennsylvania Co., etc.	1,148,649.00
Bankers Trust Company—N. Y.....	918,919.00
National City Bank—Cleveland.....	459,459.00
First National Bank—Minneapolis.....	459,459.00
	<hr/>
	\$17,000,000.00

All of said notes were in the same form except for the name of the payee banks and the amount of

the notes. There will be submitted to the Court, a photostat copy of one of the notes, to wit, the note payable to New York Trust Co., dated June 28, 1945, in the sum of \$2,297,297.00 and such photostat may be received with the same force and effect as the original executed note. These notes were all paid off on August 29, 1945. [29]

On August 29, 1945, Warner Bros. entered into a further loan agreement, such loan agreement being incorporated in the promissory notes, for a new series of notes totaling \$37,000,000.00, which were issued and delivered to the following banks in the following amounts:

Banks	Amount
New York Trust Co.—N. Y.....	\$ 5,000,000.00
Guaranty Trust Co.—N. Y.....	7,500,000.00
First National Bank—Boston	6,000,000.00
Continental Ill. Nat. Bank—.....Chicago....	6,000,000.00
Union Trust Co.—Pittsburgh	6,000,000.00
The Pennsylvania Co., etc.	2,500,000.00
Bankers Trust Company—N. Y.....	2,000,000.00
National City Bank—Cleveland.....	1,000,000.00
First National Bank—Minneapolis	1,000,000.00
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	\$37,000,000.00

All of said notes were in the same form except the name of the payee banks and the amount of the notes. There will be submitted to the Court a photostat copy of the first of these notes, to wit, the one to New York Trust Co., in the sum of five million dollars, and said photostat may be received by the Court with the same force and effect as the original executed note. These notes were paid in full by December 10, 1945.

On December 10, 1945, a new series of notes, totaling \$30,229,000.00, were issued and delivered by Warner Bros. to the following banks in the following amounts:

Banks	Amounts
New York Trust Co.—N. Y.....	\$ 4,085,000.00
Guaranty Trust Co.—N. Y.....	6,127,500.00
First National Bank—Boston	4,902,000.00
Continental Ill. Nat. Bank—Chicago.....	4,902,000.00
Union Trust Co.—Pittsburgh	4,902,000.00
The Pennsylvania Co., etc.	2,042,500.00
Bankers Trust Co.—N. Y.....	1,634,000.00
National City Bank—Cleveland	817,000.00
First National Bank—Minneapolis.....	817,000.00
	<hr/>
	\$30,229,000.00

All of the said notes were in the same form except the name of the payee banks and the amount of the notes. There may be received in evidence a photostat copy of the first of these [30] notes, to wit, the one to New York Trust Co., New York, in the sum of \$4,085,000.00. Such photostat shall have the same force and effect as the original note. All of said notes were paid off in full by May 29, 1946.

On May 29, 1946, Warner Bros. made a new note issue aggregating \$23,865,000.00, due serially to May 1, 1954, with the other terms and conditions thereof incorporated therein, to the following banks in the following amounts:

Banks	Amount
New York Trust Company—N. Y.....	\$ 3,225,000.00
Guaranty Trust Company—N. Y.....	4,837,500.00
First National Bank—Boston	3,870,000.00
Continental National Bank—Chicago	3,870,000.00
Union Trust Company—Pittsburgh (Now Mellon National Bank & Trust Co.).....	3,870,000.00

Pennsylvania Co., etc.	1,612,500.00
Bankers Trust Company	1,290,000.00
National City Bank—Cleveland	645,000.00
First National Bank—Minneapolis	645,000.00
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	\$23,865,000.00

All of said notes were in the same form except the name of the payee banks and the amount of the notes. There may be received in evidence a photostat copy of the first of these notes, to wit, the note to The New York Trust Co., New York, in the sum of \$3,225,000.00. These notes were as of November 23, 1949, outstanding except as reduced by payments on account.

Dated: June 15, 1951.

MOSS, LYON & DUNN,

/s/ By CHARLES B. SMITH,

Attorneys for Plaintiff.

FRESTON & FILES and

EUGENE D. WILLIAMS,

/s/ By EUGENE D. WILLIAMS,

Attorneys for Harry M. Warner, Jack L. Warner,
and Warner Bros. Pictures, Inc.

OLIVER B. SCHWAB and

ARTHUR LIVINGSTON,

/s/ By ARTHUR LIVINGSTON,

Attorneys for Milton Sperling and United States
Pictures, Inc. [31]

[Endorsed]: Filed June 18, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO FILE
AMENDED AND SUPPLEMENTAL
COMPLAINT

To the Defendants, Harry M. Warner, Jack L. Warner and Warner Bros. Pictures, Inc., and to Their Attorneys, Freston & Files and Eugene D. Williams; to the Defendants, Milton Sperling and United States Pictures, Inc., and to Their Attorneys, Oliver B. Schwab and Arthur Livingston:

You and Each of You Will Please Take Notice that on Tuesday, March 17, 1953, at 10:00 a.m. of said day or as soon thereafter as counsel can be heard at the courtroom of the Honorable William Mathes located in the Federal Courthouse, Los Angeles, California, plaintiff Charles B. Smith as Special Administrator of the Estate of Edward S. Birn, deceased, will move the court for leave to file an amended and supplemental complaint in the above entitled action. [32]

Said motion will be made upon the grounds that an amended and supplemental complaint is necessary in the interests of justice and to set forth matters occurring subsequent to the filing of the original complaint.

Said motion will be based on this notice, Memorandum of Points and Authorities, the proposed amended and supplemental complaint, a copy of which is served herewith and the papers, files, rec-

ords and minutes of the court in the within action.

Dated: March 13, 1953.

MOSS, LYON & DUNN and
HERMAN H. LEVY,
/s/ By HERMAN H. LEVY,
Attorneys for Plaintiff. [33]

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL COM-
PLAINT (AFTER SEVERANCE OF THIRD
CAUSE OF ACTION) FOR ACCOUNTING
AND DAMAGES

Plaintiff Edward S. Birn having sued herein derivatively on behalf and for the benefit of defendant Warner Bros. Pictures, Inc., and the stockholders thereof, and upon his death the special administrator of his estate in California having, by order of this court, been duly substituted as party plaintiff, and plaintiff having first obtained leave of the courts so to do, now files this amended and supplemental complaint as follows: (All of the allegations below being upon information and belief except allegations "1" to "4", inclusive, and allegation "22" which are alleged as of plaintiff's knowledge.

For a First Cause of Action Against All
Defendants.

1. Jurisdiction herein is founded on diversity of citizenship and amount. This action is not a collu-

sive one to confer on [34] this court jurisdiction of an action over which it would not otherwise have jurisdiction.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

3. Plaintiff's decedent was a citizen of the State of New York, and the estate of said decedent is in the course of probate in said state.

4. Plaintiff's decedent was during the time that the transactions herein complained of occurred, the owner of 400 shares of capital stock of defendant Warner Bros. Pictures, Inc., having owned said stock since August 21, 1944.

5. Defendants Warner Bros. Pictures, Inc., (hereinafter referred to as Warner Bros.) and United States Pictures, Inc., (hereinafter referred to as United) are corporations incorporated under the laws of the State of Delaware, engaged in the motion picture business and said corporations do business and maintain offices in the County of Los Angeles and State of California.

6. The defendants Milton Sperling, Harry M. Warner and Jack L. Warner are citizens of the State of California.

7. That during the time that the transactions hereinbelow complained of occurred, the defendants, Harry M. Warner and Jack L. Warner, were directors of Warner Bros.

8. That the following persons were directors of Warner Bros. during the periods stated after their respective names:

Harry M. Warner, 1923 to date; Jack L. Warner,

1923 to date; Albert Warner, 1923 to date; Waddill Catchings, 1925 to date; Morris Wolf, 1926 to date; Stanleigh P. Friedman, 1931 to date; Charles S. Guggenheimer, 1932 to date; Samuel Carlisle, 1934 to date; [35] Robert W. Perkins, 1936 to date; Samuel Schneider, 1944 to date; Joseph Bernhard, 1936 to September 10, 1950; John E. Bierwirth, November, 1945 to date.

9. That the aforementioned Harry M. Warner, Jack L. Warner and Albert Warner are brothers and the aforesaid Milton Sperling is the son-in-law of Harry M. Warner.

10. That at all times herein mentioned the defendants Harry M. Warner and Jack L. Warner, together with their brother Albert Warner owned a large and controlling block of the outstanding capital stock of Warner Bros. and said three brothers did control and dominate Warner Bros. and did actively direct its supervision, policies, actions and business including the acts hereinafter alleged in this complaint and did actually select, dominate and control the directors and officers of Warner Bros.

11. That in or about or prior to the summer of 1945 the individual defendants did illegally, wrongfully and in bad faith, conspire and act together and did conspire and still continue to conspire to waste, mismanage, divert and misappropriate the assets and business opportunities of Warner Bros. in favor of, and to further and enrich the private interests of defendant Sperling and United at the expense of Warner Bros. and regardless of the con-

sequences to Warner Bros. and each of the different things and acts done and being done by said individual defendants, and by the corporate defendants through their directors and officers, hereinbelow alleged, were, among others, and continue to be all steps in said conspiracy and were and are being committed pursuant thereto, and in furtherance of said objects. That in performing such acts and doing such things, defendants acted and continue to act unfairly to Warner Bros. and for the benefit of and advantage to United and Sperling; and the defendants Harry Warner and Jack Warner were and continue to be unfair and disloyal to their trust as directors and executive [36] officers of Warner Bros.

12. That on or about August 6, 1945, defendant United was caused to be organized with nominal capital contributions and the capital stock of said corporation was issued to Sperling and Joseph Bernhard, a Warner director who thereafter resigned from the Warner Board, severed his connection with Warner, and received \$78,000 in the form of "severance pay", though his employment contract with Warner contained no provision entitling Bernhard to severance pay. That since September 1946, defendant Sperling has been the sole stockholder of defendant United, with the exception of 62 shares of which he later assigned to the Title Insurance and Trust Company of Los Angeles to be held in trust for the benefit of his minor children.

13. That said corporation was organized in order that through it, the defendant Sperling might

wrongfully utilize and divert from Warner Bros. the funds, credits, facilities, assets and business opportunities of Warner for his private purpose and benefits to the disadvantage and detriment of Warner Bros.

14. In or about September, 1945, the defendants caused Warner Bros. and United to enter into an agreement, hereinafter referred to as the "basic agreement", which provided in substance as follows:

Six motion pictures were to be produced by United at the studio, and with the facilities and personnel of, Warner Bros. Said pictures were to be distributed by Warner Bros. through its subsidiaries, the latter to retain out of the gross proceeds of distribution certain percentages and sums as fees and expenses of distribution and the net profits from the production and distribution of said pictures were to be shared equally between Warner Bros. and United.

Warner Bros. was to advance 50% of the cost of production of said pictures and the remaining 50% of said cost was to be [37] advanced by United. In this latter connection, however, United was authorized to borrow its entire share of the cost of production and was further authorized to pledge, as security for such borrowing, the pictures to be produced, including the negatives and positive prints thereof and including the entire net proceeds of the distribution of said pictures, and Warner Bros. was to agree to such pledge and thereby subordinate its investment and provide with its funds the collateral security for the loan to United.

15. That at the time of the making of said agreement, it was intended by defendants that United was not to advance any of its private funds or capital in the performance of said agreement and that United was to meet its share of the cost of production of said six motion pictures by means of the borrowing privileges set forth in said agreement.

16. The defendants caused amendments to the basic agreement to be entered into between Warner Bros. and United. These amendments were dated November 2, 1945, May 20, 1946, December 6, 1947, December 9, 1947, July 21, 1950, and August 12, 1952. The amendments bearing date December 6, 1947, July 21, 1950 and August 12, 1952, provided, among other things, that Warner Bros. would advance 100% of the cost of a further series of motion pictures called "additional" pictures; that United would produce such additional pictures in the Warner studios; that in the production of such additional pictures, United would not be called upon to advance any of its own funds; that with respect to any picture produced by United after December 6, 1947, United would not be called upon to declare whether the same is being produced by it under the basic contract, unamended or whether it is being produced under the provisions of the said amendments, until the commencement of principal photography thereon.

17. That in furtherance of said basic agreement and intention as set forth in the preceding paragraphs and in or about [38] November, 1945, the

defendants caused an agreement to be entered into between Warner Bros. and United and The New York Trust Company (the latter being a New York banking corporation) for the loan by The New York Trust Company to United, of the latter's share of the cost of production of the pictures as aforesaid and under said agreement there was pledged as security for the repayment of said loans the security described in allegation "14" hereinabove and said basic agreement further provided that after said loans had been repaid and after the share of the production costs of the pictures advanced by Warner Bros. had likewise been repaid, the net profits resulting from the pictures were to be shared equally between Warner Bros. and United.

18. That said loan agreement was effectuated through the use of the valuable credit and banking facilities and connections of Warner Bros. in that John E. Bierwirth, a director of Warner Bros., is and has been president of The New York Trust Company since 1941, and his influence was used by Warner Bros. and Joseph Bernhard to effect said loan agreement, and further, in that Warner Bros. is a valued customer of The New York Trust Company and its patronage is favorably sought for various reasons including the fact that Warner Bros. was then indebted to a syndicate of banks, including The New York Trust Company, to the extent of several million dollars.

19. That in pursuance of said agreements as alleged in paragraphs numbered "14", "16" and "17" above, and during the period commencing in

or about November, 1945, to date, United has borrowed large sums from The New York Trust Company and the funds, credits, facilities, assets and business opportunities of Warner Bros. were and still are being used by United, and the said agreements have been in part performed and motion pictures are being produced and distributed under said agreements and said agreements remain in part unperformed. [39]

20. That in connection with the performance of said agreements, United has not advanced any of its private funds or capital and has contributed to the costs of production of said pictures solely out of loans from The New York Trust Company.

21. Defendants have designed and contrived to cause said agreements between Warner Bros. and United to be performed in a manner unfair to Warner Bros. and to benefit and to further the interests of United and Sperling at the expense and to the detriment of Warner Bros. That said agreements have not been made, performed and administered as "arms length" transactions between Warner Bros. and United.

22. That plaintiff's decedent did not discover the facts set forth in allegations "11" to "21" inclusive, until October of 1948 and plaintiff's decedent had no notice or information of circumstances which would put him on inquiry regarding such facts until October of 1948. The causes of action herein alleged have been continuous from 1945 to date hereof.

23. That by reason of the premises, Warner

Bros. has suffered and still suffers improper and illegal waste, mismanagement, misappropriation and diversion of its valuable assets, credits, facilities and business opportunities all to its loss and to the improper and personal profit and benefit of United and Sperling, in that:

(a) The aforesaid agreements, the manner in which the same have been and are being performed and administered are grossly unfair to Warner Bros.; the amount of return or profit provided thereunder to Warner Bros. and the amount of distribution fees provided thereunder to its subsidiaries are grossly unreasonable and unfair to Warner Bros.; they are not in accordance with customary agreements in the motion picture industry; and (b) Warner Bros., in effect, has been and still is [40] providing the use of its funds, credits, facilities and assets to defendant United without any adequate, reasonable or legal consideration, return, or payment to Warner Bros.; and

(c) Warner Bros. in effect, has been and still is undertaking the sole risk of capital and bearing the entire burden of the cost of production of said motion pictures involved in the aforesaid agreement, and in the event of loss in said productions, Warner Bros. will suffer the entire or principal amount thereof inasmuch as United has advanced no capital and is financially unable to meet or share any substantial losses; and despite the foregoing, Warner Bros. receives only 50% of the net profits and the other 50% of the said profits goes to United and in addition thereto, the defendant

Sperling is assured a substantial annual salary which becomes part of the production costs of said pictures; such profit divisions are grossly unfair to Warner Bros. and the receipt by United of said profits and benefits or the receipt of said benefits by Sperling under said agreements constitutes an improper and unconscionable gift or advantage to United and to Sperling at the expense of Warner Bros.; and

(d) The subordination and use of the capital assets and facilities of Warner Bros. in favor of, and as collateral security for, the aforesaid loans to United, constitutes an improper or illegal use of property of Warner Bros. for which the latter receives in return no legal, adequate or fair consideration; and

(e) The subordination and use of the capital, assets and facilities of Warner Bros. in favor of, and as collateral security for, the aforesaid loans to United, constitutes a breach of the existing written agreement between Warner [41] Bros. and a syndicate of banks under which Warner Bros. is the recipient of large business loans totalling several millions of dollars, and the said last named written agreement with said banks prohibits such use of the capital and assets of Warner Bros., and thereby Warner Bros. is endangering said loans and injuring its credit.

24. That all of the acts and matters alleged in this complaint were then known or with the exercise of reasonable diligence should have been then known to the defendants, and all of the defendants

either actively participated in said acts or matters or with knowledge of the same and the course of conduct being pursued, ratified said acts or matters or failed to take any corrective measures.

25. That by reason of the premises, the defendant United and its assets, and the profits and benefits derived by it from Warner Bros. under the above mentioned agreements, are substantially based upon, result from, and stand in the place of, the assets and business opportunities wrongfully diverted from Warner Bros. to United and hence the capital stock of United and all of its said assets belonging in equity and good conscience to Warner Bros.

26. Demand upon the directors of Warner Bros. to institute this action would be futile and plaintiff had made no such demand because all or a majority of the present Board of Directors and officers of said corporation wrongfully participated in the acts and grievances herein complained of and said Board of Directors is controlled by the active wrongdoers herein, and since those to whom application would have to be made to institute this suit are the same persons who wrongfully caused or permitted the grievances herein complained of, such persons would refuse to bring suit against themselves and in fact would be disqualified from faithfully doing so.

27. Plaintiff's decedent has made no demand upon the [42] stockholders of Warner Bros. because under the laws of Delaware the management of Warner Bros. is directed by its Board of Directors

and the stockholders cannot bring suit for Warner Bros., nor require the Board of Directors to bring such suit; and further because the defendants Jack L. Warner and Harry M. Warner and their brother Albert Warner hold upwards of sixteen per cent (16%) of the total issued stock of Warner Bros. and the balance of such stock is held by upwards of thirty thousand (30,000) stockholders widely scattered over the United States and foreign countries, so that such demand would entail a prohibitive cost and expense to the plaintiff while the management of Warner Bros. could and would defend its position by the use of its corporate funds and facilities which management is dominated and controlled by the wrongdoers herein.

28. Plaintiff has no adequate remedy at law and he and stockholders similarly situated and Warner Bros. will suffer irreparable damage unless the relief requested herein be granted.

For a Second Cause of Action Against All Defendants Except United and Sperling.

29. Repeats and realleges each and every allegation contained in paragraphs above numbered "1" to "28" (except ("11")), inclusive, with the same force and effect as though herein alleged.

30. That by reason of the acts committed by these defendants as herein alleged, the individual defendants, while acting in their fiduciary capacities and while charged with their fiduciary duties as direc-

tors, have violated said duties and have failed and neglected to providently and prudently perform their said duties and have been guilty of culpable misfeasance, nonfeasance, mismanagement, negligence, waste and dissipation of assets of Warner Bros., all of which has been to the large pecuniary loss of Warner Bros.

Wherefore, plaintiff demands judgment as follows: [43]

(1) That the defendants account to Warner Bros. for all losses and damages suffered by it and for all profits and benefits received by said defendants, and that defendants make restitution accordingly.

(2) That a trust be impressed upon the capital stock and assets of United in favor of Warner Bros.

(3) That the agreement between Warner Bros. and United to the extent that the same is unexecuted and to the extent that it is practicable to do so, should be cancelled and terminated.

(4) That defendants Harry M. Warner and Jack L. Warner make whole Warner Bros. Pictures, Inc. for all damages that it has suffered because of such defendants' successive breaches of their fiduciary duty to Warner Bros. Pictures, Inc., or arising out of the same, and because of their illegal and wrongful acts herein alleged.

(5) That plaintiff be allowed the costs, disbursements and expenses of this action, including reasonable counsel and accountants fees.

(6) That such other and further relief be granted as shall be equitable in the premises.

MOSS, LYON & DUNN and
HERMAN H. LEVY,
By HERMAN H. LEVY,
Attorneys for Plaintiff. [44]

Duly Verified. [45]

Affidavit of Service by Mail attached. [46]

[Endorsed]: Filed March 13, 1953.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR LEAVE TO
FILE AMENDED AND SUPPLEMENTAL
COMPLAINT

The above-entitled matter came on regularly before the undersigned William C. Mathes, District Judge, at his courtroom in Los Angeles, California, on March 17, 1953, at 10 o'clock a.m., plaintiff being represented by Messrs. Moss, Lyon and Dunn and Herman H. Levy, his attorneys, the defendants Harry M. Warner, Jack L. Warner and Warner Bros. Pictures, Inc. being represented by their attorneys, Messrs. Freston & Files and Eugene D. Williams, and the defendants Milton Sperling and United States Pictures, Inc. being represented by their attorney, Oliver B. Schwab:

Motion for leave to file an amended and supplemental complaint was made on behalf of the plaintiff, written objections were filed by the defendants Warner, above-named, and oral objections were

made by the defendants Milton Sperling and United States [52] Pictures, Inc., above-named; the matter was argued and submitted to the Court, and the Court having duly considered said motion and the objections thereto and the arguments of counsel:

It Is Ordered that said motion for leave to file amended and supplemental complaint be, and the same is, hereby denied; without prejudice, however, to the plaintiff making a motion at an appropriate time for leave to amend to conform to the proof as permitted by Rule 15(b) of the Rules of Civil Procedure.

Done in open court March 17, 1953.

/s/ WM. C. MATHES,
District Judge.

Submitted by:

FRESTON & FILES and
EUGENE D. WILLIAMS,

/s/ By EUGENE D. WILLIAMS,
Attorneys for Defendants Warner.

Approved as to form this 18th day of March,
1953.

MOSS, LYON & DUNN and
HERMAN H. LEVY,

/s/ By HERMAN H. LEVY,
Attorneys for Plaintiff.

OLIVER B. SCHWAB,

/s/ By OLIVER B. SCHWAB,
Attorney for Defendants Milton Sperling and United States Pictures, Inc.

[Endorsed]: Filed March 23, 1953.

[Title of District Court and Cause.]

STIPULATION CONCERNING OTHER STOCKHOLDERS' CASES

It Is Stipulated that the following is the status of the cases filed in New York which involve generally the set of facts involved in the above action:

Pending in the United States District Court, Southern District of New York: [54]

William B. Weinberger vs. Joseph Bernhard, Robert W. Perkins, Milton Sperling, Harry M. Warner, Jack L. Warner, Morris Wolf, United States Pictures, Inc., and Warner Bros. Pictures, Inc., complaint filed September 24, 1948, case dismissed December 31, 1951, but can be restored upon ten days' notice.

Anna Kassner vs. United States Pictures, Inc., Warner Bros. Pictures, Inc., Joseph Bernhard, Robert W. Perkins, Milton Sperling, Harry M. Warner, Jack L. Warner and Morris Wolf, complaint filed September 30, 1948, action dismissed upon stipulation January 11, 1951.

Irving W. Mencher vs. Harry M. Warner, Jack L. Warner, Milton Sperling, Robert W. Perkins, Morris Wolf, Joseph Bernhard, United States Pictures, Inc., and Warner Bros. Pictures, Inc., complaint filed October 5, 1948, case dismissed upon stipulation January 11, 1951.

Annie Fastenberg vs. Joseph Bernhard, Robert W. Perkins, Milton Sperling, Harry M. Warner, Jack L. Warner, Morris Wolf, United States Pic-

tures, Inc., and Warner Bros. Pictures, Inc., complaint filed October 7, 1948, action dismissed upon stipulation January 12, 1951.

Kate Lavine vs. Robert W. Perkins, Harry M. Warner, Joseph Bernhard, Jack L. Warner, Milton Sperling, Morris Wolf, United States Pictures, Inc., and Warner Bros. Pictures, Inc., complaint filed October 11, 1948, dismissed for lack of prosecution by order of Judge Knox, June 19, 1950.

Edward S. Birn vs. Milton Sperling, Joseph Bernhard, Harry M. Warner, Jack L. Warner, Morris Wolf, United States Pictures, Inc., and Warner Bros. Pictures, Inc., complaint filed November 12, 1948, dismissed by order of Judge Alfred C. Coxe, January 19, 1951, upon ground that case had abated under Rule 1 of Court Rules.

Bernard M. Geller vs. Jack L. Warner, Milton Sperling, Morris Wolf, Harry M. Warner, Robert W. Perkins, Joseph Bernhard, [55] United States Pictures, Inc., and Warner Bros. Pictures, Inc., complaint filed December 10, 1948, action dismissed upon stipulation January 18, 1951.

Abraham Fistel vs. John E. Bierwirth, Samuel Schneider, Samuel Carlisle, Joseph Bernhard, Robert W. Perkins, Milton Sperling, Harry M. Warner, Jack L. Warner, Albert Warner, Morris Wolf, United States Pictures, Inc., and Warner Bros. Pictures, Inc., complaint filed January 27, 1949, dismissed without prejudice June 18, 1953.

Lawrence B. Dottenheim vs. Milton Sperling,

Harry M. Warner, Jack L. Warner, Joseph Bernhard, Morris Wolf, United States Pictures, Inc., and Warner Bros. Pictures, Inc., complaint filed March 9, 1949, case removed from calendar and from pre-trial calendar November 17, 1952, but can be restored on ten days' notice.

Filed in the Supreme Court of New York County, New York:

William B. Weinberger vs. John E. Bierwirth, Samuel Carlisle, Waddill Catchings, Stanleigh P. Friedman, Charles S. Guggenheimer, Samuel Schneider, Albert Warner, and Warner Bros. Pictures, Inc., commenced September 28, 1948 as to Catchings; October 7, 1948 as to Carlisle and Warner Bros. Pictures, Inc.; October 11, 1948, as to Schneider; October 18, 1948 as to Albert Warner; October 29, 1948 as to Friedman. Order for bond in sum of \$50,000 has not been complied with and action stayed. Case not on calendar.

Anne Goodfriend vs. Jack L. Warner, Milton Sperling, Morris Wolf, Harry M. Warner, Robert W. Perkins, Joseph Bernhard, United States Pictures, Inc., and Warner Bros. Pictures, Inc., commenced December 8, 1948, by service on Warner Bros. Pictures, Inc., and on January 10, 1949, as against Robert W. Perkins. Order for security in sum of \$25,000 granted, and extending time to answer has not been complied with; case not on calendar.

William B. Weinberger vs. Milton Sperling, Jo-

seph Bernhard, [56] United States Pictures, Inc., and Warner Bros. Pictures, Inc., commenced December 20, 1948 by service on Warner Bros. Pictures, Inc., order for security bond in sum of \$25,000 and extending time to answer not complied with; case not on calendar.

Annie Fastenberg vs. Joseph Bernhard, Milton Sperling, United States Pictures, Inc., and Warner Bros. Pictures, Inc., commenced December 21, 1948 by service on Warner Bros. Pictures, Inc. of summons without complaint. Complaint has never been served and action is not on calendar.

Anna Kassner vs. Joseph Bernhard, Milton Sperling, United States Pictures, Inc., and Warner Bros. Pictures, Inc., commenced December 21, 1948 by service on Warner Bros. Pictures, Inc., order for bond in sum of \$25,000 and extending time to answer has not been complied with; case not on calendar.

Irving W. Mencher vs. Milton Sperling, Joseph Bernhard, United States Pictures, Inc., and Warner Bros. Pictures, Inc., commenced January 3, 1949 by service on Warner Bros. Pictures, Inc., order for bond in sum of \$25,000 and extending time to answer not complied with; case not on calendar.

Harry Rattner vs. John E. Bierwirth, Samuel Schneider, Samuel Carlisle, Joseph Bernhard, Robert W. Perkins, Milton Sperling, Harry M. Warner, Jack L. Warner, Albert Warner, Morris Wolf, United States Pictures, Inc., and Warner Bros.

Pictures, Inc., commenced February 25, 1950 by service on Warner Bros. Pictures, Inc.; March 1, 1950, as to Carlisle; March 14, 1950, as to Bierwirth. Order for security bond in the sum of \$75,000 has not been complied with; case not on calendar.

Abraham Fistel vs. John E. Bierwirth, Samuel Schneider, Samuel Carlisle, Joseph Bernhard, Robert W. Perkins, Milton Sperling, Harry M. Warner, Jack L. Warner, Albert Warner, Morris Wolf, United States Pictures, Inc., and Warner Bros. Pictures, Inc., action commenced March 2, 1950, against Warner Bros. Pictures, and on [57] April 26, 1950, against Bernhard. Answer for Warner Bros. Pictures, Inc. served June 21, 1950. Amended answer on July 13, 1950. Case is not on calendar.

Lawrence B. Dottenheim vs. Milton Sperling, Joseph Bernhard, Albert Warner, Harry M. Warner, Morris Wolf, Robert W. Perkins, Samuel Schneider, Samuel Carlisle, Waddill Catchings, Stanleigh P. Friedman, Charles S. Guggenheimer, John E. Bierwirth, Jack L. Warner, United States Pictures, Inc., and Warner Bros. Pictures, Inc., commenced as against Sperling March 22, 1950; as against Guggenheimer June 16, 1950; as against Catchings June 27, 1950; as against Bierwirth June 27, 1950; as against Warner Bros. Pictures, Inc. December 6, 1950. Answer served by Sperling on June 14, 1950; by Guggenheimer on July 7, 1950; by Catchings and Bierwirth on July 17, 1950; by Warner Bros. Pictures, Inc. on December 27,

1950. Motion to traverse service as to United States Pictures, Inc., referred to Referee. Case has not been placed on calendar.

Dated: July 3, 1953.

MOSS, LYON & DUNN and
HERMAN H. LEVY,
/s/ By HERMAN H. LEVY,
Attorneys for Plaintiff

/s/ OLIVER B. SCHWAB,
Attorney for the Defendants Milton Sperling and
United States Pictures, Inc.

FRESTON & FILES and
EUGENE D. WILLIAMS,
/s/ By EUGENE D. WILLIAMS,
Attorneys for Warner
Defendants. [58]

[Endorsed]: Filed July 14, 1953.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO FINDINGS
OF FACT AND CONCLUSIONS OF LAW

Comes Now the plaintiff and files his objections to the proposed Findings of Fact and Conclusions of Law as prepared by counsel for the defendants and files herewith his Statement of Objections to such Findings of Fact and Conclusions of Law and reasons therefor, as follows:

I.

Objection to Proposed Finding No. III.

Plaintiff objects to that portion of proposed finding No. III (page 3, lines 3-7) viz:

“That this action was commenced by Edward S. Birn as the owner of four hundred shares of the capital stock of the defendant Warner Bros. Pictures, Inc., and that he is suing derivatively on behalf of and for the benefit [135] of said defendant Warner Bros. Pictures, Inc., and the stockholders thereof;”

on the ground that this finding fails to incorporate a finding to the effect that Birn owned 400 shares during the period complained of.

Plaintiff objects to this finding on the ground that it is incomplete in that it omits to make a finding as to what constitutes the “principal purpose of the suit” (see Opinion of the Court, page 51, in which the Court says: “The ‘matter in controversy’ referred to in 28 U.S.C. Sec. 1332 must be ascertained from the ‘principal purpose of the suit.’”) And plaintiff requests that the following be added (beginning on line 7 of page 3 following the word “thereof”):

“The principal purpose of the suit was to obtain judicial scrutiny of the facts involved in the negotiation, execution and performance of a contract, and a series of three amendments which had been entered into by the corporate defendants prior to the filing of the suit; under the terms of which agreements the Warner corporation, a publicly owned company headed by Harry Warner as Presi-

dent, had participated in a series of profit-sharing transactions with United, a company which was formed for the purpose of engaging in these transactions and whose stock was owned by members of Harry Warner's family, to-wit: during the first year of United's existence, its stock was owned by defendant Sperling and one Joseph Bernhard, a former officer and director of the Warner corporation; thereafter, and at the time of the filing of the suit, it was owned by Sperling and his two infant children who are Harry Warner's grandchildren; with a view:

(a) to adjudicating the merits of plaintiff stockholder's claim which is substantially:

1. Self-dealing and overreaching to favor members of Harry Warner's family, permeated the formation of United and the negotiation, execution and performance of said agreements;

2. The terms of the contract and of the amendments were unfair to the Warner corporation; they were unwarrantedly favorable to United and Sperling and were performed in a manner unwarrantedly favorable to United and Sperling and unfair to the Warner corporation.

3. Throughout the Warner corporation's participation with United in those profit-sharing transactions, Harry and Jack Warner together with their brother Albert Warner actively directed the supervision, policies, acts and business of the Warner corporation;

4. Negotiations which were not conducted at "arms length", designed and channeled by Harry

Warner to unwarrantedly favor United and Sperling at Warner corporation's expense, with Harry Warner actively participating therein, preceded the formation of United and the drawing and signing of the contracts and the amendments;

5. Harry and Jack Warner with intent to favor Sperling; to further and enrich Sperling's private interests at Warner corporation's expense, suffered and countenanced the contract and the amendments, to contain terms unfair to the Warner corporation; and to be performed in a manner unwarrantedly favorable to United and Sperling and unfair to the Warner corporation; and furthermore, in a manner contrary to the terms of the agreements;

6. With like intent, Harry and Jack Warner, recommended that the Warner Board approve the contract (it is hereinafter referred to as the master contract) and following such recommendation, obtained the Board's approval; [137]

7. The suit was commenced on December 15, 1948; one of the amendments was signed by the corporate defendants on December 6, 1947; Harry and Jack Warner negotiated the terms of this amendment and caused the Warner corporation to sign it; the amendment materially altered the terms of the master contract; as altered, the terms of the amendment were increasingly unfair to the Warner corporation and unwarrantedly favorable to United and Sperling and one of the profit-sharing transactions, namely, the production and distribution of a picture entitled "South of St. Louis" was par-

ticipated in by the corporate defendants on the terms set forth in this amendment;

8. Neither before this amendment was signed by the Warner corporation nor during such production and distribution and up to the filing of the suit, had Harry and Jack Warner sought nor obtained the Warner Board's approval thereof or authorization to cause it to be signed.

9. At the time this amendment was signed and during the nine months which preceded its signing and at the time this suit was filed, Harry Warner individually, had a financial interest in United, to-wit: United had theretofore borrowed \$150,000 from a bank; had executed a demand promissory note payable to the bank in that sum; Harry Warner had endorsed the note and the loan was then unpaid;

10. At the time that this amendment was signed and for more than one year before, and at the time this suit was filed, Harry Warner's daughter, Betty Sperling, was financially interested in United, to-wit: In September of 1946, Sperling purchased Bernhard's stock interest [138] in United for \$400,000 in cash and thereby became the owner of all of United's outstanding stock: Sperling borrowed this money from the same bank and deposited as collateral, securities owned by Betty Sperling; on December 6, 1947, the loan was unpaid and the collateral was still in the possession of the bank:

11. At the time that this amendment was signed

and for approximately one year before, Harry Warner's grandchildren, being the children of Betty and Milton Sperling, had a financial interest in United, to-wit: In December of 1946, Sperling transferred 62 shares of United stock to Title Insurance & Trust Company, a California corporation, as Trustee for the benefit of his children, and Harry Warner knew of such interest when this amendment was signed.

12. Before the master contract was signed by the corporate defendants, Joseph Bernhard was a resident of New York State and was an officer, director in and was employed by the Warner corporation under a written contract of employment; in negotiations which preceded the drawing and signing of the master contract, it was arranged between Harry Warner and Bernhard that Bernhard form United; that he and Sperling own its stock; that Bernhard's contract of employment with the Warner corporation be terminated; that Bernhard resign as an officer and director; that Warner corporation grant him \$78,000 as "severance pay", although his employment contract contained no provision obligating the Warner corporation to make such payment.

13. That three days before the master contract was signed, the Warner Board of Directors unlawfully authorized a grant to Bernhard of \$78,000, and unlawfully paid him [139] \$78,000.

14. That neither the master contract nor any of the amendments, nor the \$78,000 grant to Bern-

hard was submitted to the stockholders of the Warner corporation for their approval; accordingly, the contract, the amendments and the payment to Bernhard were not approved by the stockholders.

15. Harry and Jack Warner, together with their brother Albert Warner, dominated and controlled the Warner Board; they selected, dominated and controlled the other directors on the Board.

16. That the Warner corporation has suffered and will suffer injury and damage as a result of the company's participation in these transactions.

17. It would have been futile for the plaintiff stockholder to demand of the Warner corporation and its directors that they act to remedy the wrongs asserted in plaintiff stockholder's claim; to institute this suit and obtain relief which to the court may seem just. Had the plaintiff addressed such demand to the corporation and its directors, they would have refused to act thereon.

18. Plaintiff stockholder did not address such demand to the stockholders of the Warner corporation for the reason that the stockholders number some 30,000; they are located in various states of the United States and in foreign countries all over the world; and it would accordingly be virtually impossible and impractical to obtain concerted action by the stockholders.

19. Plaintiff did not collude with defendants, or any of them, for the purpose of creating a case cognizable by this Court. [140]

II.

Objection to Proposed Finding No. IV.

Plaintiff objects to that portion of finding No. IV (page 3, lines 25-30), viz:

“that the contract in controversy and all amendments and supplements thereto were and are sound business arrangements made and entered into in good faith and without fraud, and said contract and amendments and supplements thereto were of benefit to Warner Bros. Pictures, Inc. and its stockholders,”

on the ground that it purports to adjudicate that the master contract and all its amendments and supplements, viz: those executed and negotiated before and after the commencement of the suit, were in all respects legal and fair to the Warner corporation and were performed in a manner fair to said company and resulted in benefit to said company.

The Court's written opinion (page 54) contains no language which indicates, in words or substance, that the Court has adjudicated issues bearing on the legality or illegality of the master contract or amendments and supplements thereto; the fairness or unfairness to the Warner corporation thereof; the fairness or unfairness to the Warner corporation of the manner in which the contract or its amendments were performed or whether or not the Warner corporation suffered and countenanced breaches thereof by United; and whether the Warner corporation benefited or was injured.

Plaintiff objects to that portion of finding No. IV, (page 3, lines 30-32 and page 4, lines 1-5), viz:

“said contract and said amendments and supplements thereto were considered by said eleven members of the Board of Directors of Warner Bros. Pictures, Inc. to be a sound business arrangement for the best present and future interests of the corporation; that in approving [141] and authorizing the contract and said amendments and supplements thereto, the officers and Board of Directors acted in good faith and exercised their independent business judgment.”

on the grounds (a) that the presence or absence of jurisdiction of the subject matter is determined by the factual situation at the time of the filing of the suit; that embraced in this portion of the proposed finding are amendments and supplements to the master contract entered into after suit was commenced, namely, the amendment dated July 21, 1950, (Exhibit 7 in evidence), and the amendment dated August 12, 1952, (Exhibit 107, last page, in evidence); (b) the amendment to the master contract dated December 6, 1947, was not presented to any meeting of the Warner Board nor did said agreement receive the Board's approval at any time before the suit was filed. Following a meeting of the Warner Board held on June 18, 1945, there was no meeting of the Board at which any matter concerning Warner-United relations was taken up or presented for Board consideration until August 17, 1950, or some two years after the suit was filed, (see

Stipulation of Facts, June 15, 1951, page 5, Section 7); (c) that this portion of the proposed finding does not conform to the first finding contained on page 54 of the Court's opinion, in that the purport of the Court's finding is that the Warner Board of Directors, as a Board, considered the contract in controversy to be a sound business arrangement for the best present and future interests of the corporation.

The purport of the proposed finding is and connotes that every individual director, including the brothers Warner, believed the contract in controversy, and all amendments and supplements thereto, to be fair to the Warner corporation.

Plaintiff further objects to that portion of finding No. IV, (page 4, lines 2-5) viz:

"that in approving and authorizing the contract and said amendments and supplements thereto, the officers and Board of Directors acted in good faith and exercised their independent business judgment."

on the grounds: (a) that as hereinabove pointed out, the above quoted portion does not conform to the Court's Opinion (page 54) in that the purport of the Court's finding is, that in approving and authorizing the master contract and such amendments thereto as were actually presented for Board approval in regular or special Board meetings, those members of the Board who voted to approve and authorize such contracts and such amendments—other than the three Warner brothers who were alleged to have dominated and controlled them—believed in good faith that the documents which they

approved and authorized were sound business arrangements for the best future interests of the corporation and they exercised their individual judgment in accordance with such belief.

The purport of the proposed finding is and connotes that not only did those directors so believe and in good faith exercise their independent judgment in accordance therewith, but that the three Warner brothers as well, so believed and were virtuous and sincere in that belief.

Plaintiff objects to that portion of proposed finding No. IV (page 4, lines 5-8) viz:

"That at the time of the execution of the contract, Albert Warner, together with the defendants Harry M. Warner and Jack L. Warner, owned only about fifteen per cent of the outstanding shares of stock of Warner Bros. Pictures, Inc.,"

on the ground that it fails to conform to the Court's Opinion (page 54) in that the figure fixed therein is "less than 20%".

Plaintiff objects to that portion of proposed finding No. IV (page 4, lines 11-13), viz:

"That neither the stockholders, its officers or [143] directors were, at any time involved in this action, antagonistic to the interests of the corporation."

on the ground that the same is not a finding of fact, but is rather a conclusion of law.

III.

Objection to Proposed Finding No. V.

Plaintiff objects to that portion of this finding (page 4, lines 15-18), viz:

"That it is not true either as alleged in the complaint, or otherwise, that all or a majority or any of the Board of Directors and officers of Warner Bros. Pictures, Inc. wrongfully participated in the acts and grievances in the complaint complained of."

on the ground that (1) it is ambiguous: (2) it does not conform to the Court's Opinion (page 54) for the reasons hereinbefore set forth on Page 9, lines 4 to 20, of these objections.

Plaintiff objects to that portion of this finding (page 4, lines 18-21), viz:

"nor was said Board of Directors dominated or controlled by Harry M. Warner, Jack L. Warner, Albert Warner, Milton Sperling, or any one or more of them."

on the ground that by including the name of Milton Sperling, the same does not conform to the Court's Opinion.

Plaintiff objects to those portions of this finding (page 4, lines 21-30), viz:

"It is not true that if demand was made upon Warner Bros. Pictures, Inc., that those to whom such application would be made to institute such suit would have permitted the alleged grievances in said complaint complained of, if such existed, to continue or that they, or any of them, would be or were disqualified from

faithfully doing their duty as directors [144] and officers of said corporation because of any matters or facts set forth in said complaint, or otherwise. That no demand was made on the directors of said Warner Bros. Pictures, Inc. to institute this action nor was any demand addressed to the stockholders of said corporation."

on the ground (1) they are ambiguous; (2) they do not conform to the Court's Opinion; (3) if any finding bearing on the content of these proposed portions should be made, it should include a finding on the truth of that portion of plaintiff's claim hereinabove set forth on page 6, lines 15 to 31 of these objections.

Plaintiff objects to that portion of proposed finding No. V (page 4, lines 30-32 and page 5, line 1), viz:

"That the stockholders of said corporation were not at the time of the execution of the contract complained of or at any time or at all under the domination or control of the three brothers Warner,"

on the ground that the same is incomplete and if incorporated into these findings, should be complemented with a finding on that portion of plaintiff stockholder's claim herein contained on page 6, lines 2 to 7, of these objections.

Plaintiff objects to that portion of the proposed findings (page 5, lines 1-4), viz:

"nor was said corporation at any time herein referred to in hands or under control antagon-

istic to the interests of said corporation and its stockholders.”

on the ground that the same is not a finding of fact, but is rather a conclusion of law.

Plaintiff objects to those portions of finding No. V (page 5, lines 5-14), viz:

“That because of the foregoing findings of fact, [145] Warner Bros. Pictures, Inc. should be by the Court realigned as a party plaintiff and that upon such realignment it appears that a plaintiff, Warner Bros. Pictures, Inc., is a citizen of the State of Delaware, and that the defendant, United States Pictures, Inc. is a citizen of the State of Delaware.

That the sole basis of the jurisdiction of this Court is the claim set forth in the complaint of diversity of citizenship and that in view of the realignment of the parties in accordance with these findings, such diversity does not exist.”

on the ground that the same are not findings of fact, but are rather conclusions of law.

IV.

Objection to Proposed Finding No. II of the Second Cause of Action.

Plaintiff objects to this proposed finding on the ground that it is not a finding of fact, but is rather a conclusion of law.

V.

Objections to Conclusions of Law as to the Second Cause of Action.

Plaintiff objects to conclusions of law Nos. 2, 3, 4, 5 and 6 on the ground that they do not conform to the Court's Opinion in that the Court, in its Opinion, has concluded to dismiss the second cause of action, not on the ground that it lacks jurisdiction, but on the ground that the same is without equity.

VI.

Objection to the Proposed Judgment.

Plaintiff requests the Court to direct that each side bear its own costs for the reason that it would be consonant with equity so to do under the facts and the uncertainty of the law on the question of this Court's jurisdiction.

MOSS, LYON & DUNN and
HERMAN H. LEVY,

/s/ By HERMAN H. LEVY [146]

Affidavit of Service by Mail attached. [147]

[Endorsed]: Filed January 19, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial the 7th day of April, 1953, in the above-entitled Court, Hon. William C. Mathes, District Judge presiding. Plaintiff was represented by Messrs. Moss, Lyon & Dunn and Herman H. Levy,

Esq., defendants Harry M. Warner, Jack L. Warner and Warner Bros. Pictures, Inc. were represented by Messrs, Freston & Files, Eugene D. Williams, Esq. and Joseph D. Karp, Esq., and defendants Milton Sperling and United States Pictures, Inc. were represented by Oliver B. Schwab, Esq.

The third cause of action set forth in the complaint was dismissed by the Court without prejudice prior to trial and no findings are herein made with reference thereto.

It appearing to the Court that the issues as to whether this Court has jurisdiction of the subject matter of the action and as to whether the action is barred by the applicable statute of [148] limitations are presented by the pleadings and that said issues should be disposed of in advance of a trial of the other issues in the case, it was ordered that the two issues, (1), as to whether this Court has jurisdiction of the subject matter of the action and (2) as to whether the causes of action are barred by the provisions of the applicable statute of limitations should be tried in advance of the trial of the other issues, and it was ordered that both parties present evidence only as to those two issues.

Thereupon, evidence on behalf of plaintiff and defendants was offered and received, the cause argued and submitted to the Court upon the two above stated issues only. The Court having duly considered the evidence and the law, and being fully advised in the premises, now files the following as its Findings of Fact and Conclusions of Law herein:

Findings of Fact

As to the First Cause of Action, the Court Finds:

I.

That this action was commenced by Edward S. Birn, a citizen of the State of New York, and since the commencement of said action, said Edward S. Birn has died and Charles B. Smith, as special administrator of the estate of Edward S. Birn, deceased, has been substituted in his place as plaintiff. That said Charles B. Smith is a citizen of the State of California.

II.

That defendants Harry M. Warner, Jack L. Warner and Milton Sperling, and each of them, are citizens of the State of California, and that the defendants Warner Bros. Pictures, Inc. and United States Pictures, Inc. are, and each of them is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen of the State of Delaware; and that as the parties are aligned by the plaintiff, it appears that the plaintiff is a citizen of the State of New York and that the defendants are citizens [149] of the states of California and Delaware, as hereinbefore stated.

III.

That this action was commenced by Edward S. , during the period of the transactions chal-

lenged in the complaint. [Mathes, J.]

Birn as the owner ^A of four hundred shares of the capital stock of the defendant Warner Bros. Pic-

tures, Inc., and that he is suing derivatively on behalf of and for the benefit of said defendant Warner Bros. Pictures, Inc., and the stockholders thereof; that by the prayer of the complaint a trust is sought to be impressed on the capital stock and assets of United States Pictures, Inc., in favor of Warner Bros. Pictures, Inc., the agreement between said Warner Bros. Pictures, Inc. and United States Pictures, Inc. referred to in the complaint is sought to be cancelled and terminated and that the defendants Milton Sperling, Harry M. Warner, Jack L. Warner and United States Pictures, Inc. be required to account to Warner Bros. Pictures, Inc., for all losses and damages suffered by it and its subsidiaries and all profits and benefits received by said defendants and that said defendants make restitution accordingly. That the claim set forth in the first cause of action of the complaint, and relief sought, are for and on behalf of the defendant Warner Bros. Pictures, Inc., and that the said Warner Bros. Pictures, Inc. is the real party in interest in said cause of action.

IV.

That the Board of Directors of Warner Bros. Pictures, Inc. is composed of eleven men of whom the defendants Harry M. Warner, Jack L. Warner and their brother Albert Warner, are but three; that

was [Mathes, J.]

the contract in controversy [^] ~~and all amendments~~
~~and supplements thereto were and are sound busi-~~

~~ness arrangements made and entered into in good~~
faith and without fraud, and said contract ^{was} ~~and~~
intended by the directors to be [Mathes, J.]
~~amendments and supplements thereto were of~~
financial [Mathes, J.]

[^] benefit to Warner Bros. Pictures, Inc. and its
stockholders, and said contract ^{was} [Mathes, J.] ~~and said amend-~~
~~ments and supplements thereto were considered by~~
said eleven members of the Board of Directors of
Warner Bros. Pictures, Inc, to be a sound [150]
business arrangement for the best present and fu-
ture interests of the corporation; that in approv-
ing and authorizing the contract ~~and said amend-~~
~~ments and supplements thereto~~, the officers and
Board of Directors acted in good faith and exercised
their independent business judgment. That at the
time of the execution of the contract, Albert Warner,
together with the defendants Harry M. Warner and
less than twenty [Mathes, J.]

Jack L. Warner, owned [^] ~~only about fifteen~~ percent
of the outstanding shares of stock of Warner Bros.
Pictures, Inc., and that neither the corporation nor
the directors or officers were shown to be at that
time or at any time under the domination or control
of the three brothers Warner above named. That
neither the stockholders, its officers or directors were,
at any time involved in this action, antagonistic to
financial [Mathes, J.]
the [^] interests of the corporation.

V.

That it is not true either as alleged in the complaint, or otherwise, that all or a majority or any of the Board of Directors and officers of Warner Bros. Pictures, Inc. wrongfully participated in the ~~acts and grievances~~ in the complaint complained of, nor was said Board of Directors dominated or controlled by Harry M. Warner, Jack L. Warner, Albert Warner, Milton Sperling, or any one or more

had been [Mathes, J.]
of them. It is not true that if demand [^] ~~was~~ made upon Warner Bros. Pictures, Inc., that those to whom such application would be made to institute

been [Mathes, J.]
such suit would have [^] ~~permitted the alleged griev-~~
~~ances in said complaint complained of, if such ex-~~
~~isted, to continue or that they, or any of them,~~
would be or were disqualified from faithfully doing their duty as directors and officers of said corporation because of any matters or facts set forth in said complaint, or otherwise. That no demand was made on the directors of said Warner Bros. Pictures,

and such a demand would have been futile;
Inc. to institute this action [^] nor was any demand addressed to the stockholders of said corporation. That the stockholders of said corporation were not at the time of the execution of the contract complained of or at any time or at all under the [151] domination or control of the three brothers Warner; nor was said corporation at any time herein

referred to in hands or under control antagonistic financial [Mathes, J.] to the ^A interests of said corporation and its stockholders.

That because of the foregoing findings of fact, Warner Bros. Pictures, Inc. should be by the Court realigned as a party plaintiff and that upon such realignment it appears that a plaintiff, Warner Bros. Pictures, Inc., is a citizen of the State of Delaware, and that the defendant, United States Pictures, Inc. is a citizen of the State of Delaware.

That the sole basis of the jurisdiction of this Court is the claim set forth in the complaint of diversity of citizenship and that in view of the realignment of the parties in accordance with these findings, such diversity does not exist.

As to the Second Cause of Action, the Court Finds:

I.

Repeats and hereby incorporates all of the preceding findings of fact and applies the same to the second cause of action set forth in the complaint.

II.

That the second cause of action presents a claim for, on behalf of and for the benefit of Warner Bros. Pictures, Inc.; that the plaintiff in the complaint has not included the defendant United States Pictures, Inc. as a defendant in the second cause of action; that complete relief as sought in the second cause of action cannot be accorded between those

now named as parties without the inclusion as a party defendant of United States Pictures, Inc.;

the financial interest therein of United States Pictures, Inc. [Mathes, J.]

that [^] this Court, as a court of equity, cannot proceed to final decision without United States Pictures, Inc. as a defendant because the interests of and extent [Mathes, J.] ~~such corporation~~ is of such ~~a~~ nature [^] that a final decree cannot be made without affecting that interest or leaving the controversy in such condition that its final determination may be wholly [152] inconsistent with equity and good conscience. That United States Pictures, Inc. is a party so indispensable in this action that a court of equity will not proceed to final judgment without it; and without said corporation as a party defendant, the cause is without equity.

Conclusions of Law

And As Conclusions of Law Based Upon the Foregoing Findings of Fact, This Court Finds and Concludes As Follows:

I.

That the first cause of action sets forth a claim solely for the benefit of Warner Bros. Pictures, Inc., and that said corporation is an indispensable party to said cause of action.

II.

That Warner Bros. Pictures, Inc., its stockhold-

ers, directors and officers are not dominated by the defendants Harry M. Warner, Jack L. Warner and their brother Albert Warner, or any of them, and that said corporation is not and has not been in the hands or under the control of persons antagonistic to the interests of said corporation in said action.

III.

That Warner Bros. Pictures, Inc. should be realigned as a party plaintiff. That upon such realignment, Warner Bros. Pictures, Inc., being a citizen of the State of Delaware, and the defendant United States Pictures, Inc., being a citizen of the State of Delaware, there is no diversity of citizenship and that by reason thereof this Court has no jurisdiction of the subject matter of said action.

As to the Second Cause of Action, the Court Finds and Concludes:

I.

That United States Pictures, Inc. has an interest in the subject matter of the second cause of action of such nature that a [153] final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that final determination may be inconsistent with equity and good conscience and therefore the Court finds that United States Pictures, Inc. is a party so necessary and indispensable that a court of equity will not proceed to determination without it; and that without said corporation as a party, the cause of action is without equity.

II.

That as to the second cause of action, Warner Bros. Pictures, Inc., a citizen of the State of Delaware, should be aligned as a party plaintiff and ~~that~~ United States Pictures, Inc., a citizen of the State

would, if joined [Mathes, J.] of Delaware, ~~should~~[^] be aligned as an indispensable party defendant; and ~~that~~ upon such realignment, there [^] ~~is~~ no diversity of citizenship as between the parties plaintiff and defendant.

III.

~~That by reason of the foregoing, this Court is without jurisdiction of the subject matter of said second cause of action.~~

IV.—

As to both causes of action, the Court finds and concludes that upon proper realignment of indispensable [Mathes, J.] the [^] parties, Warner Bros. Pictures, Inc., a Delaware corporation and citizen of the State of Delaware, becomes a party plaintiff, while United States Pictures, Inc., a Delaware corporation and citizen of the State of Delaware, is a party defendant, and that thereby there is no diversity of citizenship as between the parties plaintiff and defendants.

IV.

That there is no claim or showing of Federal jurisdiction of this Court other than the claim of diversity of citizenship and that therefore this Court

the first cause of
is without jurisdiction of the subject matter [^] of ~~this~~
and the second cause of action must be dis-
missed for want of equity [Mathes, J.]
action; [^]

V.

the [Mathes, J.]
That [^] ~~this Court is without jurisdiction and that~~
~~therefore the action should be dismissed, and such~~
judgment of dismissal shall expressly declare that
constitute an [Mathes, J.]
it does not [^] ~~operate as~~ adjudication upon the
merits and is without prejudice or res judicata
effect.

of dismissal [Mathes, J.]
Let judgment [^] be entered accordingly.

Done in Open Court This 21st Day of January,
1954.

/s/ WM. C. MATHES,
District Judge.

Submitted by:

FRESTON & FILES;
EUGENE D. WILLIAMS and
JOSEPH D. KARP,

/s/ By EUGENE D. WILLIAMS,
Attorneys for Defendants Warner. [155]

Affidavit of Service by Mail attached. [156]

[Endorsed]: Lodged December 24, 1953.

[Endorsed]: Filed January 21, 1954.

United States District Court for the Southern
District of California, Central Division.

No. 9005-WM Civil

CHARLES B. SMITH, as Special Administrator
of the Estate of Edward S. Birn, Deceased,
Plaintiff,

vs.

MILTON SPERLING, HARRY M. WARNER,
JACK L. WARNER, UNITED STATES
PICTURES, INC., and WARNER BROS.
PICTURES, INC., Defendants.

JUDGMENT OF DISMISSAL

The above-entitled action came on regularly for trial the 7th day of April, 1953, in the above-entitled Court, Hon. William C. Mathes, District Judge presiding. Plaintiff was represented by Messrs. Moss, Lyon & Dunn and Herman H. Levy, Esq., defendants Harry M. Warner, Jack L. Warner and Warner Bros. Pictures, Inc. were represented by Messrs. Freston & Files, Eugene D. Williams, Esq. and Joseph D. Karp, Esq., defendants Milton Sperling and United States Pictures, Inc. were represented by Oliver B. Schwab, Esq.

The third cause of action set forth in the complaint was dismissed by the Court without prejudice prior to trial and no findings were made herein with reference thereto.

It appearing to the Court that the issues as to whether this Court has jurisdiction of the subject matter of the action and as to whether the action

is barred by the applicable statute of [157] limitations are presented by the pleadings and that said issues should be disposed of in advance of a trial of the other issues in the case, it was ordered that the two issues, (1) as to whether this Court has jurisdiction of the subject matter of the action and (2) as to whether the causes of action are barred by the provisions of the applicable statute of limitations should be tried in advance of the trial of the other issues, and it was ordered that both parties present evidence only as to those two issues.

Thereupon, evidence on behalf of plaintiff and defendants was offered and received, the cause argued and submitted to the Court upon the two above stated issues only. The Court having duly considered the evidence and the law, and being fully advised in the premises, and having heretofore signed and filed its written Findings of Fact and Conclusions of Law, wherein and whereby judgment was ordered that said action be dismissed;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the above-entitled action be and the

without costs to any party [Mathes, J.]
same hereby is dismissed, [^] ~~and that the defendants~~
~~do and recover of and from the plaintiff their costs~~
~~hereby taxed in the sum of \$.....~~

constitute [Mathes, J.]

This judgment of dismissal does not [^] ~~operate as~~
an adjudication upon the merits and is without prejudice or res judicata effect.

January 21, 1954.

/s/ WM. C. MATHES,
District Judge.

Submitted by:

FRESTON & FILES;

EUGENE D. WILLIAMS and

JOSEPH D. KARP,

/s/ By EUGENE D. WILLIAMS,

Attorneys for Defendants Warner. [158]

Affidavit of Service by Mail attached. [160]

[Endorsed]: Lodged December 24, 1953.

[Endorsed]: Filed January 21, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO
AMEND COMPLAINT TO CONFORM TO
EVIDENCE—MEMORANDUM OF POINTS
AND AUTHORITIES

To the Defendants, Harry M. Warner, Jack L. Warner and Warner Bros. Pictures, Inc., and to Their Attorneys, Freston & Files and Eugene D. Williams; to the Defendants, Milton Sperling and United States Pictures, Inc., and to Their Attorney, Oliver B. Schwab:

You and Each of You Will Please Take Notice that on Monday, February 15, 1954, at 10:00 a.m. of said day or as soon thereafter as counsel can be heard at the courtroom of the Honorable William Mathes located in the Federal Courthouse, Los Angeles, California, plaintiff Charles B. Smith as Special Administrator of the Estate of Edward S. Birn, deceased, will move the court for leave to file an amended and supplemental complaint in the

above entitled action, to conform to the evidence at the [161] trial thereof as set forth in the proposed Amended and Supplemental Complaint, a copy of which is attached hereto and made a part hereof.

Said motion will be made upon the grounds that an amended and supplemental complaint is necessary to conform the pleadings to the evidence adduced at the trial of the action of the issues of jurisdiction and the Statute of Limitations.

Said motion will be based upon this notice, memorandum of points and authorities, the proposed amended and supplemental complaint, a copy of which is served herewith, and the pleadings, records, files and minutes of the court in the within action.

Dated: February 5, 1954.

MOSS, LYON & DUNN and
HERMAN H. LEVY,
/s/ By HERMAN H. LEVY,
Attorneys for Plaintiff.

Memorandum of Points and Authorities.

I.

Amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time and such motion may be made after judgment.

Rule 15 (a) Federal Rules of Civil Procedure.
Simms vs. Andrews, 118 F.2d 803.

Sears Roebuck & Co. vs. Marhenke, 121 F.2d 598.

II.

The court may permit a party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Rule 15 (d) Federal Rules of Civil Procedure.

III.

Leave to amend pleadings should be freely and liberally granted.

Rule 15 (a) Federal Rules of Civil Procedure.

Snyder vs. Dravo Corp., 6 F. R. D. 546.

Respectfully submitted,

MOSS, LYON & DUNN and

HERMAN H. LEVY,

/s/ By HERMAN H. LEVY,

Attorneys for Plaintiff. [163]

Affidavit of Service by Mail attached. [164]

[Endorsed]: Filed February 5, 1954.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL COMPLAINT (AFTER TRIAL TO CONFORM TO PROOF) AND FOR ACCOUNTING AND DAMAGES

Plaintiff Edward S. Birn having sued herein derivatively on behalf and for the benefit of defend-

ant Warner Bros. Pictures, Inc., and the stockholders thereof; and upon his death the Special Administrator of his estate in California having, by order of this court, been duly substituted as party plaintiff; and plaintiff having first obtained leave of the court so to do, now files this amended and supplemental complaint after trial to conform to proof, as follows: (All of the allegations below being upon information and belief except allegations "1" to "4", inclusive, and allegation "24", which are alleged as of plaintiff's knowledge.

For a First Cause of Action Against All Defendants.

1. Jurisdiction herein is founded on diversity of citizenship and amount. This action is not a collusive one to confer on [165] this court jurisdiction of an action over which it would not otherwise have jurisdiction.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

3. Plaintiff's decedent was a citizen of the State of New York, and the estate of said decedent is in the course of probate in said state.

4. Plaintiff's decedent was the owner of 400 shares of capital stock of defendant Warner Bros. Pictures, Inc. throughout the time that the transactions herein complained of occurred. He has owned said stock since August 21, 1944.

5. Defendants Warner Bros. Pictures, Inc., (hereinafter referred to as Warner Bros.) and United States Pictures, Inc., (hereinafter referred

to as United) are corporations incorporated under the laws of the State of Delaware, engaged in the motion picture business and said corporations do business and maintain offices in the County of Los Angeles and State of California.

6. The defendants Milton Sperling, Harry M. Warner and Jack L. Warner are citizens of the State of California.

7. During the time that the transactions hereinbelow complained of occurred, the defendants, Harry M. Warner and Jack L. Warner, were officers of Warner Bros. Harry M. Warner was President, and Jack L. Warner a Vice-president.

8. The following persons were directors of Warner Bros. during the periods stated after their respective names

Harry M. Warner, 1923 to date; Jack L. Warner, 1923 to date; Albert Warner, 1923 to date; Wadill Catchings, 1925 to date; Morris Wolf, 1926 to date; Stanleigh P. Friedman, 1931 to date; Charles S. Guggenheimer, 1932 to date; [166] Samuel Carlisle, 1934 to date; Robert W. Perkins, 1936 to date; Samuel Schneider, 1944 to date; Joseph Bernhard, 1936 to September 10, 1945; John E. Bierwirth, November, 1945 to date.

9. Harry M. Warner, Jack L. Warner and Albert Warner are brothers and Milton Sperling was at all times herein mentioned and is the son-in-law of Harry M. Warner.

10. At all times herein mentioned, Warner Bros. was a publicly owned corporation. Harry M. Warner and Jack L. Warner, together with their

brother Albert Warner owned a large block of its outstanding stock, to-wit: approximately 16%, and did actively direct its supervision, policies, actions and business, including the acts hereinafter alleged in this complaint. The public, namely, some 30,000 shareholders located in the various states of the United States, and in countries all over the world, owned the remainder of the company's stock.

11. Since 1945, Warner Bros. has participated with United in a series of nine transactions which involved the investment by Warner Bros. of millions of dollars in ventures in motion picture production-distribution, the sharing of profits in said ventures, accounting to each other for losses and the payment of large sums of money to said Sperling and Bernhard, under a contract and a series of five successive amendments thereto.

12. The contract is dated September 28, 1945. It was approved by the Warner Board of Directors on said day. Plaintiff claims and alleges that Harry Warner, as President of Warner Bros., participated in negotiations which preceded the drawing and approval thereof. It is hereinafter referred to as the "basic contract".

13. The first three amendments to the basic contract were entered into prior to the commencement of this suit, to-wit: [167] Amendment dated November 2, 1945; amendment dated May 20, 1946, and amendment dated December 6, 1947. The first two of said amendments were approved by the Warner Board of Directors. The third amendment was neither submitted to nor approved by the War-

ner Board before the suit was commenced. The fourth and fifth amendments to the basic contract were entered into during the pendency of the suit. They are dated July 21, 1950, and August 12, 1952, and were approved by the Warner Board of Directors. Plaintiff claims and alleges that Harry Warner, as President of Warner Bros. participated in the negotiation of all said amendments; and when the third, fourth and fifth amendments were executed, Harry Warner and his daughter Betty Sperling had a financial interest in United.

14. Plaintiff attaches photostat copies of the basic contract and all said amendments, refers to them and makes them a part of this amended and supplemental complaint as though fully set forth at length.

15. On or about August 6, 1945, United was caused to be organized for the purpose of engaging with Warner Bros. in said ventures. United's capital stock was issued to Sperling and to said Bernhard, who was then a Warner director, and a resident of the State of New York, and who subsequently resigned from the Warner Board and severed his connection with Warner Bros., to-wit: his employment contract with Warner Bros. was terminated and in connection with such termination, Warner Bros. awarded him \$78,000 "severance pay", although his employment contract contained no provision entitling Bernhard to severance pay. Since September 1946, Sperling has been United's only stockholder, with the exception of 62 shares which, prior to the commencement of this

action, he assigned to Title Insurance and Trust Company of Los Angeles, California, a California corporation, to be held in trust for the benefit of his minor children, who are Harry Warner's grandchildren. [168]

16. Plaintiff claims and alleges that United was organized as aforesaid in order that through it, Sperling might utilize Warner Bros. funds, its facilities, assets and business opportunities in a manner unfair to Warner, unwarrantedly favorable to United and Sperling; and, to further and enrich Sperling's private interests at Warner Bros. expense.

Plaintiff claims and alleges that the basic contract and said amendments are unfair to Warner Bros. and unwarrantedly favorable to United and Sperling. That all said agreements have been performed in a manner unwarrantedly favorable to United and Sperling and unfair to Warner Bros. and that the aforementioned \$78,000 award to Bernhard was unlawful.

17. Plaintiff claims and alleges that at the time of the making of the basic contract, it was intended by defendants that United was not to advance any of its private funds or capital in the performance of said agreement and that United was to meet its share of the cost of production of said six motion pictures by means of the borrowing privileges set forth in Paragraph 31 of the basic contract.

18. That in furtherance of the intention as set forth in the preceding paragraph, and pursuant to the provisions of Paragraph 31 of the basic con-

tract, the defendants caused an agreement to be entered into between Warner Bros. and United and The New York Trust Company (the latter being a New York banking corporation), which provides for the loan by The New York Trust Company to United of the latter's share of the cost of production of pictures, and under said agreement, United pledged and caused to be pledged to said bank, three pictures and the net income therefrom, as security for the repayment of loans to United on said pictures;

19. Plaintiff claims and alleges that said loan agreement was effectuated through the use of the valuable credit and banking facilities and connections of Warner Bros. in that said [169] John E. Bierwirth was the President of The New York Trust Company and his influence was used by Warner Bros. and Joseph Bernhard to effect said loan agreement, and further, in that Warner Bros. was and is a valued customer of The New York Trust Company and its patronage was favorably sought for various reasons including the fact that Warner Bros. was then indebted to a syndicate of banks, including The New York Trust Company, to the extent of several million dollars.

20. That in pursuance of all the agreements hereinbefore referred to, and during the period commencing in or about January, 1946, to approximately September, 1947, United has borrowed large sums from The New York Trust Company and the funds, credits, facilities, assets and business opportunities of Warner Bros. were and still are being

used by United, and the said agreements have been in part performed and motion pictures were and are being produced and distributed under said agreements and said agreements remain in part unperformed.

21. That in connection with the performances of said agreements, United has not advanced any of its private funds or capital and has contributed to the costs of production of three of said pictures solely out of loans from The New York Trust Company, and that all other capital required for the production of said three pictures and six additional pictures has been contributed by Warner Bros.

22. Plaintiff claims and alleges that defendants have designed and contrived to cause said agreements to be performed in a manner unfair to Warner Bros. and to benefit and to further the interests of United and Sperling at the expense of and detriment to Warner Bros. That said agreements have not been made, performed and administered as "arms length" transactions between Warner Bros. and United.

23. That in or about or prior to the summer of 1945, the [170] individual defendants did illegally, wrongfully and in bad faith, conspire and act together and did conspire and still continue to conspire to waste, mismanage, divert and misappropriate the assets and business opportunities of Warner Bros. in favor of, and to further and enrich the private interests of defendant Sperling and United at the expense of Warner Bros. and regardless of

the consequences to Warner Bros., and each of the different things and acts done and being done by said individual defendants, and by the corporate defendants through their directors and officers, as herein alleged, were, among others, and continue to be, all steps in said conspiracy and were and are being committed pursuant thereto, and in furtherance of said objects. That in performing such acts and doing such things, defendants acted and continue to act unfairly to Warner Bros, and for the benefit of and advantage to United and Sperling; and the defendants Harry Warner and Jack Warner were and continue to be unfair and disloyal to their trust as directors and executive officers of Warner Bros.

Plaintiff claims and alleges that defendants Harry and Jack Warner, together with their brother Albert Warner, did actually select, dominate and control the other directors and officers of Warner Bros.

24. That plaintiff's decedent did not discover the facts herein set forth until October of 1948, and plaintiff's decedent had no notice or information of circumstances which would put him on inquiry regarding such facts until October of 1948.

25. That by reason of the premises, Warner Bros. has suffered and still suffers improper and illegal waste, mismanagement, misappropriation and diversion of its valuable assets, credits, facilities and business opportunities all to its loss and to the improper and personal profit and benefit of United and Sperling, in that:

(a) Warner Bros. has been and is being subjected to [171] undertaking unfair, extraordinary and unwarranted risks of capital and other loss and injury in said ventures;

(b) Warner Bros. vast organization, its capital, its picture making facilities, described in the basic agreement, have been and are being made available to and utilized by, United, and through it, Sperling, without adequate, reasonable, legal considerations, return or payment to Warner Bros.; and under terms and conditions which fail to adequately safeguard Warner Bros. against advantage being unduly and improperly taken of Warner Bros. by United and Sperling, in the course of their participation in these ventures;

(c) The distribution fees and percentages of profits provided to be paid to Warner Bros. are unreasonably low and unfair to Warner Bros.;

(d) The last three amendments to the basic contract were calculated to and did compound and increase the unfairness to Warner Bros. of the terms of the basic contract and did, at Warner Bros. risk and expense, provide additional unfair advantage to United and corresponding disadvantage to Warner Bros.; and, said amendments were calculated to and did postpone and they continue to postpone unreasonably and indefinitely United's obligation to pay Warner Bros. approximately \$850,000, namely, the loss suffered by Warner Bros. in the third of such ventures;

(e) The subordination and use of the capital assets and facilities of Warner Bros. in favor of,

and as collateral security for, the aforesaid loans to [172] United, constitutes an improper or illegal use of property of Warner Bros. for which the latter receives in return no legal, adequate or fair consideration;

(f) The subordination and use of the capital, assets and facilities of Warner Bros. in favor of, and as collateral security for, the aforesaid loans to United, constituted a breach of the existing written agreement between Warner Bros. and a syndicate of banks under which Warner Bros. is the recipient of large business loans totalling several millions of dollars, and the said last named written agreement with said banks prohibits such use of the capital and assets of Warner Bros., and thereby Warner Bros. has been endangering said loans and injuring its credits.

(g) In the performance of the basic contract and the amendments, United received unfair and unwarranted advantages at Warner Bros. expense; and United was furthermore permitted to and it did, violate the terms of the said agreements and thereby gained unfair and unwarranted advantage, at Warner Bros. expense and to its detriment.

26. That by reason of the premises, the defendant United and its assets, and the profits and benefits derived by it from Warner Bros. under the above mentioned agreements, are substantially based upon, result from, and stand in the place of, the assets and business opportunities wrongfully diverted from Warner Bros. to United, and hence the capital stock of United, and all of its said assets

belong in equity and good conscience to Warner Bros.

27. Demand upon the directors of Warner Bros. to institute this action would have been futile and plaintiff had made no such [173] demand because all or a majority of the present Board of Directors and officers of said corporation wrongfully participated in the acts and grievances herein complained of and said Board of Directors is controlled by the active wrongdoers herein, and since those to whom application would have to be made to institute this suit are the same persons who wrongfully caused or permitted the grievances herein complained of, such persons would refuse to bring suit against themselves and in fact would be disqualified from faithfully doing so.

28. Plaintiff's decedent has made no demand upon the stockholders of Warner Bros. because under the laws of Delaware the management of Warner Bros. is directed by its Board of Directors and the stockholders cannot bring suit for Warner Bros., nor require the Board of Directors to bring such suit; and further because the defendants Jack L. Warner and Harry M. Warner and their brother Albert Warner hold upwards of sixteen per cent (16%) of the total issued stock of Warner Bros. and the balance of such stock is held by upwards of 30,000 stockholders widely scattered over the United States and foreign countries all over the world making it virtually impossible and impractical to obtain concerted action by the stockholders,

and would entail a prohibitive cost and expense to the plaintiff.

29. Plaintiff has no adequate remedy at law and he and stockholders similarly situated and Warner Bros. will suffer irreparable damage unless the relief requested herein be granted.

For a Second Cause of Action Against All Defendants Except United and Sperling:

30. Repeats and realleges each and every allegation contained in paragraphs above numbered "1" to "29" (except "23"), inclusive, with the same force and effect as though herein alleged.

31. That by reason of the acts committed by these defendants as herein alleged, the defendants Harry and Jack Warner, [174] while acting in their fiduciary capacities and while charged with their fiduciary duties as directors, have violated said duties and have failed and neglected to providently and prudently perform their said duties and have been guilty of culpable misfeasance, non-feasance, mismanagement, negligence, waste and dissipation of assets of Warner Bros., all of which has been to the large pecuniary loss of Warner Bros.

Wherefore, plaintiff demands judgment as follows:

- (1) That the defendants account to Warner Bros. for all losses and damages suffered by it and for all profits and benefits received by said defendants, and that defendants make restitution accordingly.
- (2) That a trust be impressed upon the capital

stock and assets of United in favor of Warner Bros.

(3) That the agreement between Warner Bros. and United to the extent that the same is unexecuted and to the extent that it is practicable to do so, should be cancelled and terminated.

(4) That defendants Harry M. Warner and Jack L. Warner make whole Warner Bros. Pictures, Inc. for all damages that it has suffered because of such defendants' successive breaches of their fiduciary duty to Warner Bros. Pictures, Inc., or arising out of the same, and because of their illegal and wrongful acts herein alleged.

(5) That plaintiff be allowed the costs, disbursements and expenses of this action, including reasonable counsel and accountants fees.

(6) That such other and further relief be granted as shall be equitable in the premises.

MOSS, LYON & DUNN and
HERMAN H. LEVY,

/s/ By HERMAN H. LEVY,
Attorneys for Plaintiff. [175]

Duly Verified. [176]

Affidavit of Service by Mail attached. [182]

[Endorsed]: Lodged February 5, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
LEAVE TO AMEND

The motion of plaintiff for an order granting him leave to file an amended and supplemental complaint came on regularly to be heard the 15th day of February, 1954, before Hon. William C. Mathes, District Judge, and was duly made, presented and argued.

Upon due consideration thereof, it is now ordered that said motion be and the same hereby is denied.

Done in Open Court February 15, 1954.

/s/ WM. C. MATHES,
District Judge.

Submitted by:

FRESTON & FILES and
EUGENE D. WILLIAMS,

/s/ By EUGENE D. WILLIAMS,
Attorneys for Defendants Warner. [183]

Approved As to Form:

MOSS, LYON & DUNN and
HERMAN H. LEVY,

/s/ By HERMAN H. LEVY,
Attorneys for Plaintiff.
OLIVER B. SCHWAB, ESQ.,

/s/ By OLIVER B. SCHWAB,
Attorney for Defendants Sperling and
United States Pictures, Inc. [184]

[Endorsed]: Filed March 31, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff Charles B. Smith as Special Administrator of the Estate of Edward S. Birn, Deceased, hereby appeals to the Court of Appeals for the Ninth Circuit from the Judgment of Dismissal entered January 21, 1954.

Dated: February 16, 1954.

MOSS, LYON & DUNN and
HERMAN H. LEVY,

/s/ By GEORGE C. LYON,
Attorneys for Plaintiff. [185]

Affidavit of Service by Mail attached. [186]

[Endorsed]: Filed February 17, 1954.

[Title of District Court and Cause.]

STIPULATION

The plaintiff having moved this Court for an order granting him leave to file an amended and supplemental complaint to conform to the proof, to which were to be attached the following contracts between the corporate defendants to wit: Contract dated September 28, 1945; Amendment dated November 2, 1945; Amendment dated May 20, 1946; Amendment dated December 6, 1947; Amendment dated July 21, 1950; and Amendment dated August 12, 1953, and

The Motion having duly come on to be heard in

open Court on the 15th day of February, 1954, before the Honorable William C. Mathes, District Judge, and

The Court having heard argument thereon by the undersigned, in the course of which the undersigned attorneys for the defendant agreed to enter into the following stipulation, [192]

It Is Stipulated As Follows:

The undersigned attorneys for the defendants agree (1) that each and all of plaintiff's claims which are set forth in the said proposed amended and supplemental complaint have been duly brought to the notice and attention of this court during and prior to the trial heretofore had herein; (2) in the event of an appeal from the judgment heretofore entered on January 21, 1954, the undersigned attorneys for plaintiffs will not urge, in the Appellate Courts, that the subject matter which is contained in said proposed amended and supplemental complaint, or any part thereof, is being raised by plaintiff for the first time on appeal.

Dated: February 15, 1954.

MOSS, LYON & DUNN and
HERMAN H. LEVY,

/s/ By HERMAN H. LEVY,
Attorney for plaintiff.

FRESTON & FILES and
EUGENE D. WILLIAMS,

/s/ By EUGENE D. WILLIAMS,
Attorneys for defendants, Harry M. Warner, Jack
L. Warner and Warner Bros. Pictures, Inc.

/s/ OLIVER B. SCHWAB,

Attorney for Defendants Milton Sperling and
United States Pictures, Inc. [193]

[Endorsed]: Filed March 31, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 196, inclusive, contain the original Complaint; Answer of Defendants Sperling et al; Answer of Defendants Harry M. Warner et al; Stipulation of Facts; Motion for Leave to File Amended and Supplemental Complaint; Objections to Motion for Leave to File Amended and Supplemental Complaint; Order Denying Motion for Leave to File Amended and Supplemental Complaint; Stipulation Concerning Other Stockholders' Cases; Memorandum of Decision; Objections to Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment of Dismissal; Motion for Leave to Amend Complaint to Conform to Evidence, etc.; Proposed Amended and Supplemental Complaint to Conform to Proof, etc.; Order Denying Motion for Leave to Amend; Notice of Appeal; Stipulation and Order Extending Time to Docket Appeal; Designation of Record on Appeal; Stipulation; Stipula-

tion re Designation of Record and a full, true and correct copy of Minutes of the Court for April 12, 1954 which, together with the original exhibits and copy of reporter's transcript of proceedings on trial, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27th day of April, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy.

In the United States District Court, Southern District of California, Central Division

No. 9005-WM-Civil

Edward S. Birn, Plaintiff, vs. Milton Sperling, Harry M. Warner, Jack, L. Warner, United States Pictures, Inc., and Warner Bros. Pictures, Inc., Defendants. (now entitled): Charles B. Smith as Special Administrator of the Estate of Edward S. Birn, Deceased, Plaintiff, vs. Milton Sperling, et al., Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, Calif., Tuesday, April 7, 1953

Honorable William C. Mathes, Judge Presiding.

Appearances: For the Plaintiff: Messrs. Moss, Lyon & Dunn and Herman H. Levy, Esq. For the Defendants Warner: Messrs. Freston & Files, Eugene D. Williams, Esq., and J. D. Karp, Esq. For the Defendants Milton Sperling and United States Pictures, Inc.: Oliver B. Schwab, Esq. [1*]

Mr. Williams: If your Honor please, before we do start, may I have the privilege of asking to have associated as counsel for the Warner defendants Mr. Joseph D. Karp, of New York City. Mr. Karp is admitted to practice in all of the courts of the State of New York and in the United States [3]

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

District Courts for the Southern and Eastern Districts of New York, and also in the Court of Appeals for the Second Circuit.

The Court: You move his admission?

Mr. Williams: I move his admission for this case. I, of course, vouch for his integrity and ability.

The Court: The motion will be granted. [4]

* * * * *

Mr. Levy: I proceed now, sir, to reading a list of interrogatories which is marked Exhibit 105, the answers to which are contained in Exhibit 105-A for identification. Both exhibits are now in for identification only.

“To the defendant United States Pictures, Inc.:

“Pursuant to the order of court dated April 11, 1949, authorizing plaintiff to serve and file additional interrogatories, please furnish, under oath, written answers to the following interrogatories:

* * * * * [271]

The Court: These are matters that deal with accounting?

Mr. Williams: Yes, your Honor. [272]

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The Court: Do you have to read it into the record at this juncture? If you wish it in the record at this point, wouldn't it be just as well to have the reporters copy them into the record, or is it something that you wish me to hear at this point? [273]

Mr. Levy: No, I do not think that a reading of it will have any greater effect on your Honor at this point, would give your Honor a greater understanding of the relevancy and the meaning of these

figures if read rather than heard. But in view of the fact that my brother Williams objects to the introduction of the physical document itself, I must read the figures into the record so that the record will contain the answer to the interrogatory.

The Court: Do you wish the document in the record at this point because of the orderly presentation of the evidence? As far as I am concerned, it would not help me to have you read these figures to me.

Mr. Levy: I agree, your Honor.

The Court: It may be helpful, and it has been up to this point, to have you present the matter in a certain chronological fashion. Otherwise I would urge you to offer it all into evidence and permit me to read it, instead of going through this much slower process of listening to it.

Mr. Levy: Yes, your Honor.

The Court: We are coming, gentlemen, I think, to the point where it will be desirable to revert to my former practice, and that is to receive all these matters into evidence, and of course the record on appeal may be limited to avoid duplications and unnecessary matters. [274]

* * * * *

The Court: Here is the way I view it, gentlemen: This is the plaintiff's case. On the plaintiff's case he may, within the limitations of the rules, make his record as he thinks best. The same with the defendants when the time comes to introduce the defendants' evidence.

I will reverse my rulings as to Exhibits 103,

103-A, 104, 104-A, and 104-B and receive those documents into evidence. [275]

* * * * *

(The documents previously marked Plaintiff's Exhibits 103, 103-A, 104, 104-A and 104-B, were received in evidence.) [276]

* * * * *

(The documents previously marked Plaintiff's Exhibits 105 and 105-A were received in evidence.) [279]

* * * * *

The Court: You may proceed in the case on trial.

Mr. Levy: Referring, if the court please, to Exhibits 105 and 105-A from which I read just before the adjournment, I shall read, with the court's permission, only two or three of the interrogatories contained in that exhibit which set forth a fact or facts without long lists of figures, and rely upon the factual content of these exhibits, rely for the actual content of these exhibits on the physical documents themselves, which I shall offer into evidence.

The Court: I suggest you first offer into evidence the documents themselves.

Mr. Levy: Yes, your Honor.

Mr. Williams: I understand they have already been received.

* * * * *

Mr. Levy: This Exhibit 105, incidentally, is dated April . . . , as I have it here, 1949. But, as I have read before, it was served pursuant to an order of this court [280] dated April 11th and the an-

swers to the interrogatories are dated May 18, 1949 and verified by J. C. Yoss, Treasurer, United States Pictures. [281]

* * * * *

Mr. Levy: Next are 106 and 106-A.

Exhibit 106, may it please the court, is a list of interrogatories addressed to the defendant United States Pictures, pursuant to an order of this court dated February 27, 1950. It is dated—and I refer now to Exhibit 106—March 24, 1950.

The answers thereto are contained in Exhibit 106-A. That exhibit contains a notation, namely, "Submitted March 25, 1950."

* * * * *

The Court: Do you offer them in evidence? [286]

Mr. Levy: I do offer them in evidence at this time.

Mr. Williams: May the record show that the date of the verification of Exhibit 106 is July 20, 1950?

The Court: Exhibits 106 and 106-A for identification are received in evidence.

(Plaintiff's Exhibits 106 and 106-A for identification were thereupon received in evidence.)

* * * * * [287]

I proceed now, your Honor, to Exhibit 107, marked for identification up to the present time. That exhibit contains both the interrogatories and the answers thereto. I now offer Exhibit 107 for identification into evidence.

The Court: Is there objection? [299]

* * * * *

(The document heretofore marked Plaintiff's Exhibit 107, was received in evidence.) [300]

* * * * *

Attached to this exhibit are schedules, if the court please, commencing with Schedule A, the pages of which are unnumbered, however, and proceeding down to and including Schedule H which, incidentally, is the August 12, 1952 amendment, namely, the latest amendment to the master contract.

That, if the court pleases, is the substance of the Exhibit No. 107 in evidence.

The Court: I take it the schedules attached to Exhibit 107 are understood by the parties to be in evidence.

Mr. Williams: Yes, your Honor. [423]

The Court: As part of the exhibit.

Mr. Levy: Yes, your Honor.

The Court: And that they should be given various identifying letters. Schedules A to H, inclusive, shall have in this record here the same identifying letter under the Exhibit 107 as those exhibits are given in Exhibit 107 itself. In other words, Schedule A will be in this record Exhibit 107, Schedule A of Exhibit 107.

Mr. Levy: Yes, your Honor, and so referred to throughout the trial as Schedule A of Exhibit 107 in evidence?

The Court: Yes, for the purposes of identifying in this record here as distinguished from the identification in the exhibit itself.

Mr. Levy: Yes, your Honor.

(The schedules were marked Schedules A to H, inclusive, to Exhibit 107 in evidence.)

Mr. Levy: I proceed to the reading of Exhibit 108—I withdraw that. May I at this time offer Exhibits 108 and 108-A into evidence. [424]

* * * * *

The Court: In the case on trial you may proceed. Have Exhibits 108 and 108-A been offered?

Mr. Levy: My recollection is that they have, your Honor.

* * * * *

(The documents were thereupon marked Plaintiff's Exhibits 108 and 108-A and received in evidence.)

Gentlemen, if there is no objection, when ever an order is made receiving in evidence any deposition, interrogatories or answers thereto, requests for admissions or answers or responses thereto, or any other exhibit to which there is attached one or more charts, schedules or other writings or exhibits, all such attachments shall be deemed likewise received in evidence, and shall be identified in the records of this trial as a subdivision of the exhibit of which a part, and shall be sub-numbered or sub-lettered as the case may be, or otherwise given the same identification as in the exhibit of which a part.

Is that agreeable?

Mr. Levy: It is agreeable.

The Court: So ordered. You may proceed, Mr. Levy. [426]

* * * * *

The Court: Were the requests for admissions directed to all?

Mr. Levy: Yes, sir, your Honor, to Harry M. Warner, Jack L. Warner, and Warner Bros. Pictures, Inc.

The Court: Is it stipulated that the admissions are the admissions of all the defendants to whom the requests were directed?

Mr. Williams: Yes, if your Honor please. [427]
* * * * *

"Request No. 4. That at all times mentioned in Plaintiff's complaint, Defendants Harry M. Warner and Jack L. Warner together with their brother Albert Warner did actively direct the supervision, policies, actions and business of Warner Bros. Pictures, Inc."

The answer thereto is: "Yes."

"Request No. 5. That at all times mentioned in Plaintiff's complaint, the defendants Harry M. Warner and Jack L. Warner together with their brother Albert Warner exercised the selection of directors and officers of Warner Bros. Pictures, Inc."

The answer is: "No." [430]

* * * * *

Request No. 8:

"That there are no other independent producers contracts entered into by Warner Bros. Pictures, Inc. with the same terms and conditions as the contract with United States Pictures, Inc."

The answer is: "Yes."

Request No. 9:

"That at the time of the making of the agreement of September 28, 1945, between Warner Bros. and United States Pictures, Inc., it was intended by the parties thereto that United was not to advance any of its private funds or capital in the performance of said agreement, but was to meet its share of the cost of production of the motion pictures to be produced thereunder by means of the borrowing privileges set forth in said agreement."

The answer thereto is: "No." [432]

Request No. 10:

"That the loan agreement dated October 31, 1945, between The New York Trust Company, United States Pictures, Inc., and Warner Bros. Pictures, Inc. was effectuated through the credit and banking facilities and connections of Warner Bros."

The answer thereto is: "No."

Request No. 11:

"That pursuant to the agreements between United and Warner Bros., and The New York Trust Company and United and Warner Bros., and during the period commencing in or about November, 1945, to date, the funds, credits, facilities, assets and business opportunities of Warner Bros. were and still are being used by United."

The answer thereto is:

"No; except as the funds, credits, and facilities of Warner Bros. are provided by the contract of November, 1945, between United States and Warner's, to be so used, and except as provided by all amendments and supplements to said contract."

Request No. 12——

Mr. Williams: Incidentally, before we leave that, we were actually referring to the contract of September 28, 1945. [433] Don't you think it would be better if we agreed to stipulate that instead of "November, 1945," it should be "September 28, 1945," in that answer?

Mr. Levy: Your statement to the effect that that is what you intended is perfectly satisfactory to me, and I will so stipulate, your Honor.

The word "November" may be by Mr. Williams changed in the original and in its place there may be substituted the words "September 28, 1945."

Request No. 12:

"That during the period January 1, 1945, to November 23, 1950, Warner Bros. has not asked for, nor has there been given, the written consent of the holders of 75 per cent in amount of the outstanding notes referred to in paragraph 10 of the Stipulation of Facts on file in the within action permitting any lien or incumbrances to exist on any of the following assets of Warner Bros. or its subsidiaries:

"(a) Motion pictures, photoplays produced in the United States or Canada.

"(b) Accounts or notes receivable or moneys due or to become due under contracts."

The answer thereto is: "Yes." * * * * * [434]

I proceed now, if the court please, to Exhibit 109 in evidence, and I at this time offer Exhibit 109 and 109-A in evidence.

The Court: They may be received in evidence.

(Plaintiff's Exhibits 109 and 109-A for identification were thereupon received into evidence.)

Mr. Levy: 109 contains a series of requests for admissions addressed to the defendants Milton Sperling and United States Pictures, as follows:

Before I read them, may I state that Exhibit 109, namely, the requests, is dated July 20, 1951, and the answers thereto that are contained in Exhibit 109-A are dated August 2, 1951, and were verified on the same day, namely, August 2, 1951?

* * * * * [435]

Request No. 2:

"That at the time of making the agreement dated September 28, 1945, between Warner Bros. Pictures, Inc. and United States Pictures, Inc. it was intended by the parties thereto that United was not to advance any of its private funds or capital in the performance of said agreement and that United was to meet its share of the cost of production of the motion pictures to be produced thereunder by means of the borrowing privileges set forth in said agreement."

The answer is: "This is denied."

Request No. 3:

"That pursuant to said agreement dated September 28, 1945, and during the period commencing in or about November, 1945, to date the funds, credits, facilities, assets, and business opportunities of Warner Bros. were and still are being used by United States Pictures, Inc."

The answer is as follows:

“Pursuant to the agreement dated September 28, 1945, as amended and supplemented, U. S. Pictures has received advances from Warner Bros. toward the cost of production of its pictures, in accordance with [436] provisions of said agreement as amended and supplemented, and has to that extent used Warner Bros. funds and credits. Also, pursuant to said agreement dated September 28, 1945, as amended and supplemented, United States Pictures has utilized the studio and facilities of Warner Bros, in the making of its pictures and to that extent has used the facilities and assets of Warner Bros. Except so as admitted, No. 3 is denied.” [437]

* * * * *

Request No. 6:

“That the contract dated September 28, 1945, between Warner Bros. and United States Pictures, Inc. was negotiated by defendant Milton Sperling and defendant Harry M. Warner.”

The answer is as follows:

“Milton Sperling and Harry M. Warner each participated to some extent in the negotiations for the contract dated September 28, 1945, but other persons had an important part in the negotiations.”

* * * * *

I proceed now, if the court please, to a reading [439] of Exhibit 110, and before doing so I offer it in evidence.

The Court: Received in evidence.

(Plaintiff's Exhibit No. 110 for identification was thereupon received in evidence.) [440]

* * * * *

Mr. Levy: Very well. These are requests directed to defendants Harry M. Warner and Jack L. Warner, and each of them, and the answers, as I believe I indicated a moment ago, sir, are contained in the same exhibit, the answer following the request in each case.

“Request No. 1. Warner’s business is producing motion pictures.

A. True in part; but in addition to producing motion pictures, Warner through its subsidiaries is [441] also engaged in the business of distributing motion pictures and, until March 2, 1953 was in the business of exhibiting motion pictures in hundreds of motion picture theatres operated by its subsidiaries. Warner derives no profit as such from its production of motion pictures; its profits are derived and were derived from exhibition and distribution of motion pictures. For example, in the fiscal year 1944-1945, Warner’s net profit from distribution was about \$4,590,000, and from exhibition about \$5,310,000; in the fiscal year 1947-1948 distribution resulted in a net loss of about \$246,000, while exhibition resulted in a profit of about \$12,000.”

Mr. Williams: “\$12,000,000.”

Mr. Levy: “\$12,000,000.”

“Request No. 2. A series of buildings and other structures located in Burbank acquired and maintained at considerable cost, house Warner’s many and varied picture making facilities.

A. True.

Request No. 3: A number of departments, headed

by executives employ the varied skills of men and women trained in the arts and many sciences; business administrators, accountants, lawyers; and the labor, [442] skilled and unskilled of a large personnel.

A. True.

Request No. 4: The total cost of Warner's production program for the fiscal year 1944 to 1945 as reported by Price, Waterhouse & Co. was approximately \$31,000,000."

Mr. Williams: "\$31,300,000."

Mr. Levy: "\$31,300,000." Thank you.

The answer: "True; said costs being about \$22,000,000 direct and about \$9,300,000 overhead.

Request No. 5: Warner's product, namely prints of pictures put up in cans, is supplied to motion picture exhibitors throughout the world on a rental basis.

A. True in part; and to this extent, namely, that Warner produced positive prints of motion pictures which are supplied through motion picture exchanges in the United States and foreign countries to motion picture exhibitors on either a percentage or a flat rate license basis, and to theatres operated by Warner and its wholly owned subsidiaries.

Request No. 6. A subsidiary company and affiliated companies handle the distribution and exploitation of Warner's pictures, the booking and contracting for the rentals, the publicizing, [443] advertising, the delivery of the product to exhibitors and the collection of the income therefrom.

A. True in part; but it should be added that there are several subsidiary companies and that in addition to those referred to in the request for admissions, there are theatre companies owned and operated by Warner. [444]

* * * * *

Request No. 9. Warner's system of bookkeeping is so designed as to enable Warner to determine, among other things, the total production cost to Warner of each picture produced.

A. True.

Request No. 10. The said system separates 'production costs' into two categories; 'direct' costs and 'overhead' costs.

A. True.

Request No. 11. During the fiscal year, 1944-1945, as reported by Price, Waterhouse & Co. some \$9,300,000.00 or approximately 42%, constituted Warner's 'overhead'.

A. True.

Request No. 12. Warner's stock is publicly owned [445] and is listed on the New York Stock Exchange.

A. True.

Request No. 13. In 1945 Harry Warner was and still is Warner's president and chief executive.

A. True.

Request No. 14. In 1945 Jack Warner was and still is a Warner vice-president and an executive in charge of production.

A. True.

Request No. 15. The defendants Harry and Jack

Warner reside in California and look after matters requiring company attention on the West Coast and Albert Warner who resides in New York attends to matters in the East.

A. True in part; but it is also true that Harry Warner frequently, and Jack Warner occasionally, attends to matters requiring the company's attention in the East. [446]

* * * * *

Request No. 19. Between them, the three brothers own approximately 15% of Warner's outstanding stock.

A. True as of the year 1945; but from time to time the holdings of the three brothers vary in amount and in percentage of the outstanding stock.

Request No. 20. The rest of the said stock is distributed among approximately 30,000 shareholders located in various parts of the world. [447]

A. True.

Request No. 21. In the year 1945, the Warner Board of Directors was composed of eleven men.

A. True.

Request No. 22. Four of the said directors were lawyers, who, or the law firms in which they are partners, received substantial annual or other compensation from Warner.

A. True.

Request No. 23. Three of said directors were employees whom Warner paid substantial annual salaries.

A. True in part; until September 10, 1945, three

of said directors were employees of Warner; after that date only two were such employees.

Request No. 24. Only one of said directors, namely Waddill Catchings, was not on Warner's pay roll.

A. Not true; the directors Waddill Catchings, Morris Wolf, Charles S. Guggenheimer and John E. Bierwirth were not on Warner's payroll.

Request No. 25. Throughout 1945 Harry Warner and Jack Warner knew that each of the said seven directors who received compensation from Warner as hereinbefore described in previous requests and who sat on the Warner Board, was conscious of the fact [448] that opposition to the expressed views of the said Warner brothers on matters involved in the resolutions passed by the said Board on the 25th day of September, 1945, the 28th day of September, 1945, and the 23rd day of November, 1945, was fraught with danger to such director's private interests.

A. Not true. [449]

* * * * *

Request No. 29. Approximately 3 or 4 months before September 28, 1945, Harry Warner planned that an independent motion picture production company operated and controlled jointly by Milton Sperling and Joseph Bernhard would produce pictures in the [450] Warner studios.

A. Not true. The facts are that several months prior to September 28, 1945, Harry Warner conceived the idea that in view of the fact that Jack Warner was the only production head of Warner, that Warner should get some other competent per-

son connected with the organization in such manner that if Jack Warner should be unable to continue with his duties, the company would have available a competent and trained person to take his place. From this initial conception, by degrees and after much thought and many conferences, there was developed the idea which was finally put into effect of having an individual motion picture production company which should be operated and controlled by Milton Sperling and Joseph Bernhard and which would produce motion pictures at the Warner studios for Warner distribution.

Request No. 30. In the summer of 1945, Harry Warner and Jack Warner knew that Sperling was anticipating his discharge from military service in or about September of that year.

A. True.

Request No. 31. In the summer of 1945, Harry Warner and Jack Warner knew that Bernhard was [451] friendly with John S. Bierwirth, president of The New York Trust Company.

A. True. [452]

Request No. 32:

"Before and after August 4, 1945, Harry Warner and Jack Warner discussed said plan with Milton Sperling."

The answer is: "True."

Request No. 33:

"Before and after August 4, 1945, Harry Warner and Jack Warner discussed said plan with Joseph Bernhard."

The answer is: "True." * * * * * [453]

Request No. 37:

"In said discussions Harry Warner suggested to Bernhard, in substance, that he (Bernhard) try to influence John S. Bierwirth, president of The New York Trust Company, to approve the said bank loaning to an independent motion picture production company which [454] would be formed and owned equally by Bernhard and Sperling, on terms substantially like those contained in the agreement thereafter entered into between Warner, United and the said Trust Company on October 31, 1945, 50 per cent of the production costs of a series of motion pictures which would be produced by such independent company in the Warner studios."

The answer is: "Not true."

Request No. 39:

"Before August 4, 1945, Joseph Bernhard, acting in behalf of Warner, had been influential in procuring a loan or loans from The New York Trust Company to Warner."

The answer is: "True."

* * * * *

Request No. 41:

"Before August 4, 1945, Harry Warner and Jack Warner knew that Bernhard, acting in behalf of Warner, [455] had been influential in procuring a loan or loans from The New York Trust Company to Warner."

The answer is: "True."

* * * * *

Request No. 43:

"Before August 4, 1945, Bernhard told Harry

Warner in substance, that he (Bernhard) believed that he could procure The New York Trust Company to agree to loan an independent motion picture production company, which would be firmed and owned equally by Bernhard and Sperling, on terms substantially like those contained in the said agreement dated October 31, 1945, 50 per cent of the production cost of a series of motion pictures which said company would produce at the Warner studios."

The answer is: "True, except as to the terms referred to as contained in the agreement dated October 31, 1945, [456] as to which these answering defendant did not then know what, if any, terms would be contained in any agreement thereafter to be drawn, or what agreement or agreements if any, would be required to be drawn, and except that neither defendant can say positively that said statement was made either before or after August 4, 1945."

Request No. 44:

"Before August 4, 1945, Harry Warner and Jack Warner told Bernhard, in substance, that if he could procure The New York Trust Company to agree to loan to an independent motion picture production company which would be formed by and owned equally between him (Bernhard) and Sperling, on terms substantially like those contained in said agreement dated October 11, 1945, 50 per cent of the production cost of a series of motion pictures which such independent company would produce in the Warner studios, they (Harry and Jack War-

ner) would approve of Warner entering into an agreement with such an independent production company, whose terms would be substantially like those of the master agreement thereafter entered into between Warner and United."

The answer is: "True, as to Harry Warner, except the references [457] to the terms of an agreement dated October 31, 1945, as to which the situation is the same as that stated in response to request No. 43, and except that there was no reference to any terms dependent upon those of the master agreement referred to for the reason that at that time there was no knowledge on the part of anybody as to what those terms would ultimately be. As to defendant Jack Warner, the statement is untrue."

Request No. 45:

"On or about August 4, 1945, Harry Warner and Jack Warner knew that Sperling and Bernhard had agreed between themselves:

(a) To form an independent motion picture production company;

(b) That Sperling and Bernhard would each purchase 125 shares of the capital stock of the company so formed by them and pay \$12,500 therefor."

The answer is: "True." [458]

* * * * *

Request No. 47:

"Prior to August 4, 1945, Harry Warner and Jack Warner knew that Sperling had not theretofore engaged in the business of 'independent pro-

duction of motion pictures' as that term is known and understood in the motion picture industry."

The answer is: "True."

Request No. 56: "Prior to August 4, 1945, Harry Warner and Jack Warner knew that Bernhard had not theretofore engaged in 'independent production of motion pictures' as that term is known and understood in the motion picture industry."

The answer is: "True."

Request No. 57:

"Prior to August 4, 1945, Harry Warner and Jack Warner knew that Bernhard had approached John S. Bierwirth, president of The New York Trust Company, with a view to obtaining a commitment from said Bierwirth that the said bank would enter into an agreement with Warner and an independent motion picture production [459] company, which would be formed and owned equally by Bernhard and Sperling, the terms of which agreement would be substantially like the terms of the agreement subsequently entered into between Warner, United and the said bank on October 31, 1945."

The answer is: "True, as to Harry Warner, except as to the references to the terms of an agreement of October 31, 1945, as to which said defendant refers to the statement made in response to request No. 43, and as to the provisions with respect to the master agreement, the terms of which were then not known to either of the parties; untrue as to defendant Jack Warner."

Request No. 58:

"Prior to August 4, 1945, Bernhard told Harry

Warner, in substance, that he (Bernhard) desired Warner to pay him \$78,000 on severing his (Bernhard's) connection with Warner."

The answer is: "Not true."

Request No. 59:

"On or before September 11, 1945, Bernhard told Harry Warner and Jack Warner, in substance, that he had obtained a commitment from John S. Bierwirth, president of the New York Trust Company, that said bank [460] would make loans to United on terms substantially like those contained in the agreement which was subsequently entered into between said three parties and dated October 31, 1945."

The answer is: "As to Harry Warner, true; except as to the reference to the terms of the agreement of October 31, 1945, as to which the answer is the same as that made to request No. 43; not true as to Jack Warner."

Request No. 60:

"Before September 11, 1945, Harry Warner and Jack Warner knew that Sperling and Bernhard had entered into a stockholders agreement, which agreement is dated August 31, 1945."

The answer is: "True, except as to Harry Warner, that he did not know the terms of such agreement or its date; not true as to Jack Warner."

Mr. Levy: May I at this point call Mr. Williams' attention to the fact that the answer is somewhat unintelligible, probably due to an error on the part of the typist?

Mr. Williams: If there is any error, it is on my part.

Mr. Levy: The answer as it reads: "True, except as to Harry Warner"—it probably means true as to Harry Warner except that he did not know the terms of the agreement. [461]

Mr. Williams: That is correct.

Mr. Levy: Is that what you meant?

Mr. Williams: Yes.

The Court: May it be stipulated that the answer to Request No. 60, which appears on lines 26 through 28 on page 12 of Exhibit 110 may be amended to read:

"True, as to Harry Warner, except that he did not know the terms of such agreement or its date; not true as to Jack Warner"?

Mr. Williams: That is correct.

* * * * *

Mr. Levy: Request No. 61:

"On and before September 11, 1945, Harry Warner and Jack Warner knew that Bernhard had obtained a commitment from John S. Bierwirth, president of The New York Trust Company, to the effect that said bank would enter into an agreement with United and Warner, the terms of which agreement would be substantially like the terms of the agreement which was subsequently entered into between Warner, United, and the said Bank on October 31, 1945."

The answer is: [462] "True, except as to the reference as to the terms of an agreement of October 31, 1945, as to which they then knew nothing."

Request No. 62:

"Before the master agreement was drawn, the substance of its provisions was agreed upon in oral discussions between Harry Warner, Jack Warner, Milton Sperling, and Joseph Bernhard."

The answer is: "True." [463]

* * * * *

Mr. Levy: Then I shall re-read Request 63 and follow it with the answer thereto.

"Request No. 63. Prior to September 10, 1945, Harry Warner outlined to Herbert Freston, Esq., one of the attorneys for Warner, the substance of what he (Harry Warner) desired to be written into a proposed contract between Warner and United.

A. Not true; Harry Warner stated that Bernhard had caused United to be organized with Bernhard and Milton Sperling as stockholders and that said corporation would produce six pictures over a period of years for distribution by the Warner distributor. Warner told Freston what the distribution charge would be and that Price, Waterhouse & Co. was determining the overhead charge to the producer. Warner did not state the substance of what he desired written into the proposed contract but stated he and Bernhard had discussed only certain points to be covered by the agreement and asked Freston to contact Bernhard as to the points [464] discussed and then prepare the agreement as attorney for Warner, so as to be fair to both parties.

Request No. 64. On September 28, 1945, Harry Warner and Jack Warner knew the substance of

the terms which are contained in the master contract. A. True.

Request No. 65. The Thirty-First paragraph of the master contract provides:

‘If the Producer shall borrow from any banking association a substantial part of the cost (that is, that part of such cost as the Producer is obligated to pay hereunder) of producing any photoplay herein provided for, the Producer shall notify the Company, in writing, to that effect.’

At the time the master contract was signed Harry Warner and Jack Warner knew that United, Sperling and Bernhard intended, as provided in the Thirty-first paragraph thereof, to borrow from The New York Trust Company that part of each picture’s production cost as United was obligated to pay. A. True.

Request No. 66. At the time the master contract was signed, Harry Warner and Jack Warner knew that the total capital of United was \$25,000; that [465] Sperling and Bernhard had each purchased 125 acres of the capital stock of said company for \$12,500. A. True. * * * * *

Request No. 69. On September 11, 1945, Harry Warner and Jack Warner knew that Warner made United a cash loan for ‘general purposes’ in the sum of \$50,000.

A. True, as to defendant Harry Warner; not true as to defendant Jack Warner.

Request No. 70. On September 11, 1945, Harry Warner and Jack Warner knew that Warner and United would enter into and execute an agreement

the substance of the terms of which would be that contained in the master contract subsequently signed by said parties on September 28, 1945. [466]

A. On September 11, 1945 Harry and Jack Warner believed and intended that Warner and United would enter into an agreement as described in this request; but, of course, they did not know that such agreement would be executed."

And I would call your Honor's attention to the fact that the answering defendants underscored the word "know" on line 7 of page 15 of this Exhibit 110 in evidence.

"Request No. 71. On September 11, 1945, Harry Warner and Jack Warner knew that after the said master contract would be signed by Warner and United, the same would be implemented by a contract between Warner, United and The New York Trust Company, the substance of the terms of which would be that contained in the contract subsequently entered into between the said three parties on October 31, 1945.

A. Not true.

Request No. 72. Subdivision 4½ of Paragraph Seventh (a) of the master contract provides:

'Out of the gross receipts retained by the Company it shall pay to the Producer, by way of reimbursement, a sum equal to all costs and expenses paid or incurred by the Producer in the production of each of the photoplays herein provided for, which costs of the Producer shall include a [467] reasonable allowance for its operating and general overhead in connection with the production of each

such photoplay. Such overhead shall include such reasonable executive salaries as the Producer shall pay to Joseph Bernhard and Milton Sperling and other production employees; provided, however, that any part of such salaries which may properly be charged to a picture as a "direct charge" shall not be included in computing the Producer's general overhead.'

Before the master contract was signed, neither Harry Warner nor Jack Warner indicated to Sperling or Bernhard what he (Harry Warner and Jack Warner) considered a 'reasonable allowance' for United's 'operating and general overhead', above referred to. A. True.

Request No. 73. Before the master contract was signed, neither Harry Warner nor Jack Warner indicated to Sperling or Bernhard what salaries he would consider 'reasonable executive salaries.'

A. Harry and Jack Warner both indicated to Sperling and Bernhard the salaries they would consider 'reasonable executive salaries' but as to whether this matter was discussed before or [468] after the master contract was signed, neither defendant can state.

Request No. 74. Before and at the time of the execution of the master contract Harry and Jack Warner knew that never before had Warner entered into a contract with an independent producer which gave the producer the same benefits and advantages as provided in said master contract.

A. Not true. Each contract entered into between Warner and an independent producer gave to War-

ner and such producer certain benefits and advantages which in many particulars were identical and in general were the same or similar to those provided in the master contract but which in many details differed from contract to contract. The question of whether the provisions of each contract gave to the producer benefits or advantages which were the same or less or similar to those provided in the master contract is a matter of opinion and a matter which can only be determined by the ultimate results of each contract. For that reason, these defendants are unable to state categorically as to any contract whether it gave the producer the same, greater, lesser or similar benefits and advantages to those given other producers under other contracts. * * * * * [469]

Request 76. Before and at the time of the execution of the master contract, Harry Warner and Jack Warner knew that Warner had never before entered into a contract with an independent producer, by the terms of which contract Warner incurred the same risks as it incurred by the master contract.

A. Not true. Defendants repeat the answer to request No. 74 as the answer to this request. In addition thereto, it should [470] be pointed out that every contract with an independent producer and every undertaking by Warner to make feature motion pictures involves numerous risks to Warner to the full extent and in many cases beyond the total production cost of said picture. The amount and character of such risks to Warner to the full

extent and in many cases beyond the total production cost of said picture. The amount and character of such risks are determined by numerous circumstances, including general business conditions, current attitude of the public towards entertainment, type of picture involved, the story, the stars, the integrity, character and ability of the producer and director, and numerous other matters, too many to enumerate, all of which must be weighed to determine the extent and seriousness of the risks involved. A weighing of all such factors and the determination of whether such picture should be produced is a matter of business judgment; and the question of whether the incurring of such risks is justifiable from a business standpoint is ultimately proved only from the results obtained. In any event, the making of a contract with any independent producer as well as the making of any picture by Warner itself involves [471] risks which are broadly like and similar to those incurred by the master contract. * * * * * [472]

Request No. 87:

"In or about November, 1945, Harry Warner nominated John S. Bierwirth as a Warner director to fill the vacancy created by Bernhard's resignation as a director."

The answer is: "True."

Request No. 88: [477]

"In November, 1945, John S. Bierwirth was elected a Warner director."

The answer is: "True."

Request No. 89:

“On February 15, 1946, Harry Warner knew that Warner made a cash loan to United for ‘general purposes’ in the sum of \$100,000.”

The answer is: “True.”

Request No. 90:

“On February 15, 1946, Harry Warner and Jack Warner knew that the master contract contained no provision for ‘general purposes’ loans by Warner to United.”

The answer is: “True.” * * * * * [478]

Request No. 96. On September 18, 1946, Harry Warner and Jack Warner knew that Bernhard sold his interest in United to Sperling for \$400,000 cash.

A. True.

Request No. 97. On September 18, 1946, Harry Warner and Jack Warner knew that Sperling had borrowed \$400,000 from The New York Trust Company for the purpose of purchasing Bernhard’s stock in United. A. True.

Request No. 98. On September 18, 1946, Harry Warner and Jack Warner knew that Mrs. Betty Sperling, Harry Warner’s daughter, had deposited with said New York Trust Company collateral owned by her for the purpose of securing the said loan. A. True.

Request No. 99. In or about December, 1946, Harry Warner and Jack Warner knew that Sperling assigned 62 shares of United capital stock to The Title Insurance and Trust Company of Los Angeles as trustee, to be held in trust for the benefit

of the minor children of Milton and Betty Sperling.

A. True. [481]

“Request No. 100. Since November 7, 1945, Harry Warner and Jack Warner knew that the ‘budget’ of each of the pictures which United produced under the master contract and its amendments was prepared by United.

A. Not true as to Harry Warner; true as to Jack Warner.

* * * * *

Request No. 104. Before December 6, 1947, Sperling [482] told Harry Warner that he (Sperling) was unwilling to proceed with the production of the three pictures which then remained unproduced.

A. True only to the extent that he was temporarily unwilling to proceed.

Request No. 105. On December 6, 1947 Warner and United entered into an amendment to the master contract bearing that date.

A. True.”

That amendment, if the court please, is Exhibit No. 4 in evidence.

Mr. Williams: Exhibit 4.

The Court: Stipulated?

Mr. Williams: So stipulated, your Honor.

Mr. Levy: “Request No. 106. On or before December 6, 1947 Sperling, acting on behalf of United, and Harry Warner and Jack Warner acting on behalf of Warner, orally agreed on the substance of the terms of the said amendment.

A. True.

Request No. 107. On December 6, 1947 Harry

Warner and Jack Warner knew the substance of the terms of the said amendment.

A. True.

Request No. 108. On December 9, 1947 Warner [483-484] and United entered into a further amendment to the master contract. A. True.

Request No. 109. On December 9, 1947 Harry Warner and Jack Warner knew the substance of the terms of the amendment bearing that date.

A. True."

The amendment referred to in the two previous requests is Exhibit No. 5 in evidence.

Mr. Williams: So stipulated, your Honor.

Mr. Levy: "Request No. 110. On or before December 6, 1947 Harry Warner and Jack Warner knew that Warner had paid Bernhard the sum of \$78,000 as 'severance pay' in installments of \$3,000 commencing with the week of November 7, 1945.

A. True.

Request No. 111. On or before December 6, 1947 Harry Warner and Jack Warner knew that the actual production cost of 'Clock and Dagger' exceeded the budgeted cost thereof by over a quarter of a million dollars.

A. Not true as to Harry Warner; true as to Jack Warner. [485]

* * * * *

Request No. 113. On December 6, 1947 Harry Warner knew that the actual production cost of 'My Girl Tisa' exceeded the budgeted cost thereof by over \$100,000. A. Not true.

* * * * *

Request No. 116. On and before December 6, [486] 1947, Harry Warner and Jack Warner knew that United had borrowed \$814,090 from The New York Trust Company in connection with the production of 'My Girl Tisa.'

A. True in part; they knew that United had borrowed from The New York Trust Company, but not the amount. [487]

* * * * *

Request No. 118:

"Before December 6, 1947, Harry Warner and Jack Warner knew that percentagewise Warner's overhead for the period commencing March 3, 1946, to March 1, 1947, was greater than Warner's overhead during the period commencing February 24, 1944, to February 24, 1945."

The answer is: "True."

Request No. 119:

"Before December 6, 1947, Harry Warner and Jack Warner knew that percentagewise Warner's overhead during the year 1947 was greater than Warner's overhead during the period commencing February 24, 1944, to February 24, 1945."

The answer is: "True." [488]

Request No. 132. "On or before December 6, 1947 Harry Warner and Jack Warner knew that United had theretofore delivered to Warner a statement of United's overhead for the year 1946.

A. Not true as to defendant Harry Warner; true as to Jack Warner.

Request No. 133. On or before December 6, 1947 Harry Warner and Jack Warner knew that said

statement disclosed that United overhead, allocated to the production cost of the two pictures completed by United during that year, namely 'Cloak and Dagger' and 'Pursued,' was in excess of \$200,000. [494]

A. Not true as to defendant Harry Warner; true as to Jack Warner.

Request No. 134. On or before December 6, 1947 Harry Warner and Jack Warner knew that a sum in excess of \$200,000, representing United overhead incurred by United during 1946 was allocated by United to the production cost of the pictures 'Cloak and Dagger' and 'Pursued,' and made a part of the total production cost of said pictures.

A. Not true as to defendant Harry Warner; true as to Jack Warner.

Request No. 135. On or before December 6, 1947 Harry Warner and Jack Warner knew that included in United's overhead, referred to in requests Nos. 132 to 134 inclusive, was:

(a) An item in excess of \$50,000 relating to stories and/or story rights and/or scenarios purchased or otherwise acquired by United which were not related to the pictures 'Clock and Dagger' and 'Pursued' and were not used by United but which were abandoned and written off by United as worthless.

(b) An item of \$25,000 paid by United to Prinzmetal & Grant, attorneys; that said attorneys had rendered no legal services therefor; that said [495] \$25,000 was paid by United to said attorneys as a commission in connection with United's obtaining

the services of Gary Cooper for 'Cloak and Dagger.'

(c) An item in excess of \$20,000 paid by United to Donald Hyde for services performed by him as an assistant to Sperling, and that Hyde, as such assistant, had rendered services in connection with the production of 'Clock and Dagger' and 'Pursued.'

* * * * *

"(d) An item in excess of \$20,000 paid to Oliver B. Schwab and Schwab & Shapiro, attorneys for United; and that said attorneys had rendered legal services in connection with the production of said pictures.

(e) An item of \$7500 to Hemisphere's attorney [496] and that such attorney had rendered legal services in connection with the production of 'Pursued.'

(f) An item in excess of \$22,000 paid to Bernhard for services as an 'executive' of United.

A. Not true as to defendant Harry Warner, true as to Jack Warner except as to the statement concerning legal services of Printzmetal & Grant. [497]

* * * * *

Request No. 137:

"On December 6, 1947, Harry Warner and Jack Warner knew that Warner had advanced in excess of \$800,000 as its share of the production cost of My Girl Tisa."

The answer is:

"Not true as to defendant Harry Warner; true as to Jack Warner."

Request No. 138:

"On December 6, 1947, Harry Warner and Jack

Warner knew that United had produced and completed the production *My Girl Tisa*; that the said picture had theretofore been exhibited to the military forces of the United States."

The answer is:

"Not true as to defendant Harry Warner; true as to Jack Warner."

* * * * *

Request No. 140:

"On and before August 1, 1948, Harry Warner and [498] Jack Warner knew that in all probability Warner would suffer a production loss in connection with *My Girl Tisa*."

The answer is: "Not true."

Request No. 141:

"On August 1, 1948, Harry Warner and Jack Warner knew that Warner would suffer a production loss in connection with *My Girl Tisa*."

The answer is: "Not true."

Request No. 142:

"On and before July 21, 1950, Harry Warner and Jack Warner knew that Warner had suffered a production loss in connection with *My Girl Tisa*."

The answer is:

"If by 'suffered a production loss' is meant that the rentals from the film, less proper deductions, had not equaled the cost of production, the answer is true as to Jack Warner, not true as to Harry Warner."

Request No. 143:

"On July 21, 1950, Harry Warner and Jack Warner knew that Warner entered into an amendment

to the master contract which is dated July 21, 1950.”

The answer is: “True.” [499]

That amendment, if your Honor please, is in evidence as Exhibit No. 7.

Request No. 144:

“At the time said amendment was executed, Harry Warner and Jack Warner knew the substance of its terms.”

The answer is: “True.”

Request No. 145:

“On July 21, 1950, Harry Warner and Jack Warner knew that in 1948 United had produced South of St. Louis as an ‘additional’ picture, and that in 1949 United had produced Three Secrets as an ‘additional’ picture.”

The answer is: “True.”

* * * * *

Request No. 152:

“On or before July 21, 1950, Harry Warner and Jack Warner knew that percentagewise Warner’s overhead for the period commencing February 29, 1948, to February 26, 1949, was greater than Warner’s overhead during the period commencing February 24, 1944, to February 24, 1945.”

The answer is: “True.”

Request No. 153:

“On or before July 21, 1950, Harry Warner and Jack Warner knew that percentagewise Warner’s overhead during the period commencing February 24, 1949, and terminating February 24, 1950, was greater than [502] Warner overhead during the

period commencing February 24, 1944, to February 24, 1945."

The answer is: "True."

Request No. 154:

"On or before July 21, 1950, Harry Warner and Jack Warner knew that the actual production cost of the picture *South of St. Louis* exceeded the budgeted cost thereof by approximately \$150,000."

The answer is:

"Not true as to Harry Warner; true as to Jack Warner."

Request No. 155:

"On or before July 21, 1950, Harry Warner and Jack Warner knew that United had theretofore delivered to Warner a statement of United's overhead for the year 1947."

The answer is:

"Not true as to Harry Warner; true as to Jack Warner."

Request No. 156:

"On or before July 21, 1950, Harry Warner and Jack Warner knew that said statement disclosed that United overhead, allocated to the production cost of *My Girl Tisa*, which was completed by United during 1947, was in excess of \$200,000."

The answer is:

"Not true as to Harry Warner; true as to Jack Warner." [503]

Request No. 157:

"On or before July 21, 1950, Harry Warner and Jack Warner knew that a sum in excess of \$200,000, representing overhead incurred by United during

1947, had been allocated by United to the production cost of *My Girl Tisa*, and made a part of the total production cost of that picture."

The answer is:

"Not true as to Harry Warner; true as to Jack Warner."

Request No. 158:

"On or before July 21, 1950, Harry Warner and Jack Warner knew that included in United's overhead, referred to in requests numbers 156 and 157, was:

"(a) An item in excess of \$40,000 relating to stories and/or story rights and/or scenarios purchased or otherwise acquired by United which were not related to the picture *My Girl Tisa* and were not used by United but were abandoned and written off by United as worthless;

"(b) An item in excess of \$20,000 paid to Sperling for services rendered by him in the capacity of an 'executive' to United;

"(c) An item in excess of \$35,000 paid to Donald Hyde for services rendered by him as an assistant to Sperling in the production of said picture; [504]

"(d) An item in excess of \$18,000 paid to United's attorneys for services rendered by them in connection with the production of said picture;

"(e) An item in excess of \$10,000 representing salaries paid to actors who rendered no services in consideration of said money paid them."

The answer is:

"Not true as to Harry Warner; true as to Jack Warner."

Request No. 159:

"On July 21, 1950, Harry Warner and Jack Warner knew that United had theretofore delivered to Warner a statement of United's overhead for the year 1948."

The answer is:

"Not true as to Harry Warner; true as to Jack Warner."

Request No. 160:

"On July 21, 1950, Harry Warner and Jack Warner knew that said statement disclosed United's overhead allocated to the production cost of the picture South of St. Louis was in excess of \$100,000."

The answer is:

"Not true as to Harry Warner; true as to Jack Warner."

Request No. 161:

"On or before July 21, 1950, Harry Warner and Jack Warner knew that a sum in excess of \$100,000 representing overhead incurred by United in 1948 had been [505] allocated by United to the production cost of South of St. Louis, and made a part of the total production cost of that picture."

The answer is:

"Not true as to Harry Warner; true as to Jack Warner."

Request No. 162:

"On or before July 21, 1950, Harry Warner and Jack Warner knew that included in United's overhead referred to in request Numbers 160 and 161, was:

“(a) An item in excess of \$18,000 paid to Sperling for services rendered in his capacity as a United ‘executive’;

“(b) An item in excess of \$30,000 paid to Donald Hyde, who rendered services as an assistant to Sperling in the production of said picture;

“(c) An item in excess of \$13,000 paid to J. C. Yoss who rendered services as an accountant in connection with the production of said picture;

“(d) An item in excess of \$13,000 paid to United’s attorneys who rendered services in connection with the production of said picture.”

The answer is:

“Not true as to Harry Warner; true as to Jack Warner.” [506]

* * * * *

Request No. 168. On August 12, 1952, Harry Warner knew that Warner had entered into an amendment to the master contract which was dated that day. A. True.” [508]

That amendment, if the court please, is attached to Exhibit 107 and is contained in Schedule H of Exhibit 107 in evidence.

“Request No. 169. At the time said amendment was executed, Harry Warner and Jack Warner knew the substance of its terms.

A. True.

Request No. 170. On August 12, 1952, Harry Warner and Jack Warner knew that no picture had been produced by United during 1952 and up to August 12 of that year. A. True.

Request No. 171. On August 12, 1952, Harry

Warner and Jack Warner knew that throughout the year of 1952 and up to said day, United had not engaged in principal photography on any picture.

A. True. * * * * * [509]

Request No. 175. On or before August 12, 1952, Harry Warner and Jack Warner knew that during 1952 and up to said date, United had paid Sperling \$1500 a week for services rendered and expenses incurred by Sperling. A. True.

Request No. 176. On or before August 12, 1952, Harry Warner and Jack Warner knew that percentage-wise Warner's overhead for the period commencing February 26, 1950 and terminating February 24, 1951 was greater than Warner's overhead during the period commencing February 24, 1944 to February 24, 1945. A. True.

Request No. 177. On or before August 12, 1952, Harry Warner and Jack Warner knew that percentage-wise [510] Warner's overhead for the period commencing February 25, 1951 and terminating March 1, 1952 was greater than Warner's overhead during the period commencing February 24, 1944 to February 24, 1945. A. True.

Request No. 178. On August 12, 1952, Harry Warner and Jack Warner knew that in 1951 United produced 'Distant Drums' and 'Retreat, Hell!'

A. True.

Request No. 179. On August 12, 1952, Harry Warner and Jack Warner knew that the actual production cost of the picture 'Distant Drums' exceeded the budgeted cost thereof by over a quarter of a million dollars, and that the actual production

cost of the picture 'Retreat, Hell!' exceeded the budgeted cost of that picture by over \$150,000.

A. Not true as to Harry Warner; true as to Jack Warner. [511]

* * * * *

Request No. 188. Since September 18, 1946, Harry Warner and Jack Warner have known that United's business policies were determined solely by Sperling. A. True. [514]

* * * * *

Request No. 190. Since September 18, 1946 Harry Warner and Jack Warner knew that whether United should or would abandon and write off a literary property purchased or acquired by United for the purpose of making a motion picture was determined solely by Sperling. A. True.

Request No. 191. Since September 18, 1946, Harry Warner and Jack Warner have known that whether United should sell or otherwise dispose of a literary property purchased or acquired by United for the purpose of making a motion picture was determined solely by Sperling.

A. Not true.

Request No. 192. Sub-paragraph 6 of paragraph Seventh (a) of the master contract provides as follows:

'The Producer may, from time to time, in preparation for production and during the course of production, incur contractual obligations as an incident to its activities herein provided for, and provided such obligations or commitments are incurred in [515] connection with such production

program, the Company shall, weekly, on proper vouchers or billing from the Producer, reimburse the producer for a sum equal to one-half of such obligations, * * *

Since September 18, 1946, Harry Warner and Jack Warner have known that any and all contractual obligations incurred by United, and any and all commitments made by United, which are referred to in the above quoted paragraph, were determined to be so incurred and were determined to be so made solely by Sperling.

A. True, except for the control exercised by Warner's right to approve or disapprove the budget of each picture.

Request No. 193. Since September 18, 1946, Harry Warner and Jack Warner have known that the amount of compensation paid by United to Sperling for services rendered by him was determined solely by Sperling.

A. True, except for the limitation contained in the master contract that such compensation must be 'reasonable.'

Request No. 194. Since September 18, 1946, Harry Warner and Jack Warner have known that the [516] amount of compensation which United should or would pay to 'production employees.' referred to in sub-paragraph 4½ of paragraph Seventh (a) of the master contract, and quoted herein on p. 121½, line 13, was determined solely by Sperling.

A. True.

Request No. 195. Since September 18, 1946, Harry Warner and Jack Warner have known that the

compensation which United should or would pay to any and all persons in United's employ was determined solely by Sperling. A. True.

Request 196. Since September 18, 1946, Harry Warner and Jack Warner have known that the price of any item of property purchased or acquired by United in the course of the production of pictures was determined solely by Sperling.

A. True.

Request No. 197. Since December 7, 1946, Harry Warner and Jack Warner have known"—

That is an error.

Mr. Williams: It is pointed out in the answer.

Mr. Levy: Yes. It should be "December 6, 1947" instead of "December 7, 1946," and it is pointed out in the answer, your Honor. May I at this time move to correct Request No. [517] 197 so as to read: "Since December 6, 1947"?

Mr. Williams: Mr. Levy, may I suggest that if you leave it the way it is now, it is perfectly clear. If you amend it now, then you have got to change the answer, too, and that makes it that much more difficult.

Mr. Levy: Oh.

The Court: You have the commitment you seek, do you not?

Mr. Levy: Yes, your Honor. And I shall read it. The request, then, is:

Request No. 197. "Since December 7, 1946, Harry Warner and Jack Warner have known that whether a picture thereafter produced by United should or would be a 'remaining original' picture or an 'addi-

tional' picture was determined solely by Sperling.

A. Not true, since December 7, 1946, but it is true since December 6, 1947.

Request No. 198. Since September 18, 1946, Harry Warner and Jack Warner have known that the dates upon which United would pay its obligations to Warner, in connection with facilities made available to United by Warner in the making of 'original' pictures, was determined solely by Sperling.

"A. Not true. [519]

* * * * *

Mr. Levy: I offer in evidence Exhibit 111, being a document entitled "Answers by Defendant Warner Bros. Pictures, Inc. to Request for Admissions Dated March 30, 1953."

* * * * *

(Plaintiff's Exhibit No. 111 for identification was thereupon received in evidence.)

Mr. Levy: Request No. 1:

"Meetings of the Warner Board of Directors are held in New York City. Albert Warner customarily presides at such meetings, except on those occasions when Harry Warner is present.

"A. True."

Request No. 2:

"No stenographic notes are taken of the proceedings held at Board meetings. Minutes are made and kept. [523] "A. True."

Request No. 3:

"The collective opinion of Harry, Jack, and Albert Warner on matters presented at Board meetings and the action desired by them to be taken

thereon are voiced by the generally presiding Albert Warner.

"A. True in part; not true in part. If the Warner Brothers are in accord, their views are expressed at board meetings either by Harry Warner or Albert Warner. Sometimes they are not in agreement, in which case those present express their several views. Sometimes matters are brought before the board as to which they have not theretofore formed an opinion, in which case each expresses his own view. Never do any of the brothers express a personal desire as to what action of the board should be."

Request No. 4:

"At a special meeting of the Warner Board held on September 25, 1945, the following resolution was unanimously adopted:

" 'Resolved: That the officers of the Corporation be authorized to terminate the employment agreement of Joseph Bernhard with the mutual consent of Mr. Bernhard and the Corporation, such termination to be effective on November [524] 7, 1945, and that Mr. Bernhard be paid the sum of Seventy-eight Thousand (\$78,000) Dollars as severance pay, such sum to be payable in twelve (12) monthly installments commencing on December 1, 1945.' "

Mr. Williams: Incidentally, the minutes from which that excerpt has been taken have already been marked in evidence in this case, I believe. I think it might be of assistance if we indicated the exhibit number.

Mr. Levy: Yes; I was about to say, your Honor,

that the resolution which I had read is from Exhibit 17 in evidence.

The Court: So stipulated?

Mr. Williams: So stipulated, your Honor.

Mr. Levy: The request proceeds as follows:

“Before the Board voted on the above resolution, Albert Warner, who presided at said meeting, stated, among other things and in substance:

(a) That Bernhard and Sperling, Harry Warner’s son-in-law, had organized a motion picture company, namely, United;

(b) That United was about to embark on the making of a series of pictures at the Warner studios, under a contract with Warner which was being prepared, the substance of which contract [525] had been agreed upon between Harry and Jack Warner, on behalf of Warner, and by Bernhard and Sperling, on behalf of United.

A. True as to the fact and the wording of the resolution quoted; true that before the board voted on said resolution, Albert Warner stated in substance that Bernhard and Milton Sperling, Harry Warner’s son-in-law, were to join in United States Pictures, which would engage in the production of motion pictures to be distributed by Warner Bros. Otherwise, not true.”

Request No. 5:

“Before the Warner Board voted on the said resolution dated September 25, 1945, Albert Warner told the directors present, among other things and in substance, that he and Harry and Jack Warner desired the adoption of the said resolution.

A. Not true." [526]

* * * * *

Request No. 12. The first picture, namely 'Cloak and Dagger', was photographed and completed in 1946 and has been exhibited since August of 1946.

A. True.

Request No. 13. The second picture, namely 'Pursued' was photographed and completed in 1946 and has been exhibited since January 1947.

A. True in part, except that said picture was first exhibited March 8, 1947.

Request No. 14. The third picture, namely 'My Girl Tisa', was photographed and completed in 1947 and has been exhibited since November, 1947.

A. True, except that the first exhibition of said picture was February 7, 1948.

Request No. 15. The fourth picture, namely [533] 'South of St. Louis', was photographed and completed in 1948 and has been exhibited since January of 1949.

A. True, except that the first exhibition of said picture was March 12, 1949.

Request No. 16. The fifth picture, namely, 'Three Secrets', was photographed and completed in 1949 and has been exhibited since the early part of 1950.

A. True, except that said picture was first exhibited October 14, 1950.

Request No. 17. The sixth picture, namely 'The Enforcer' was photographed and completed in 1950 and has been exhibited since January of 1951.

A. True, except that said picture was first exhibited February 24, 1951.

Request No. 18. The seventh picture, namely 'Distant Drums', was photographed and completed in 1951 and has been exhibited since December of 1951.

A. True.

Request No. 19. The eighth picture, namely 'Retreat, Hell', was photographed and completed in 1951 and has been exhibited since February of 1952. [534] "A. True.

Request No. 20. United did not photograph any pictures in 1952.

A. True." [535]

Request No. 21:

"The ninth picture, namely Blowing Wild, is presently in the process of being photographed. Principal photography thereon was begin in February of 1953. A. True." [536]

* * * * *

Request No. 30:

"Warner paid Bernhard Seventy-eight thousand (\$78,000) Dollars in installments of Three Thousand (\$3,000) Dollars a week, commencing December 1, 1945."

Mr. Williams: If your Honor please, may I state in this connection, although I waive the objection to that question, I do not waive the point that the element of paying Bernhard severance pay of \$78,000 is within the issues of this case as such.

My view is, if this has any relevancy or admissibility, it is only in connection with the allegations of the complaint to the effect that contracts were made for the purpose of enriching the son-in-law of Harry Warner and to the detriment of Warner

Brothers Pictures, Inc. But I do not concede that this particular point is an issue in the case as such.

Mr. Levy: The answer is: "True." [540]

* * * * *

Mr. Levy: I shall start again with Request 31:

"At no meeting of the stockholders of Warner were the stockholders advised of the following:

"(a) The substance of the master contract and/or its amendments. "A. Not true.

"(b) The substance of the contracts entered into between Warner and United and The New York Trust Company. "A. Not true.

"(c) The substance of the agreement between United and Hemisphere Films, Inc., dated May 20, 1946. "A. True.

"(d) That Milton Sperling was Harry Warner's son-in-law. "A. Not true.

"(e) That Sperling owned 50 per cent of United's outstanding capital stock, between September 28, 1945, and September 18, 1946. "A. True.

"(f) That on September 18, 1946, Sperling acquired the remaining 50 per cent of United's outstanding stock. "A. True.

"(g) That, for the purpose of acquiring the remaining 50 per cent of United's capital stock, Sperling personally borrowed Four Hundred Thousand (\$400,000) Dollars from The New York Trust Company. [542] "A. True.

"(h) That on or about September 16, 1946, Mrs. Betty Sperling, the wife of Milton Sperling and the daughter of Harry Warner, deposited certain stock, owned by her, of Warner Bros. Pictures with

the New York Trust Company as security for the repayment of the said loan. A. "True.

"(i) That, since December, 1946, Sperling has owned all the outstanding capital stock of United, with the exception of 62 shares. "A. True.

"(j) That, since December 23, 1946, said 62 shares have been held by the Title Insurance and Trust Company of Los Angeles, California, as Trustee, for the benefit of the minor children of Milton and Betty Sperling, which children are Harry Warner's grandchildren. "A. True." [543]

* * * * *

This exhibit, if the court please, is dated April 6, 1953. It is verified by Roy J. Obringer on the 3rd day of April, 1953.

I proceed, your Honor, to Exhibit 112 which I offer in evidence.

* * * * *

(The document was thereupon marked Plaintiff's Exhibit No. 112 and received in evidence.)

Mr. Levy: This exhibit contains a series of requests for admissions addressed to the defendant Milton Sperling. [547]

* * * * *

Request No. 4. Beginning with the autumn of 1934 and up to and including part of 1939, Sperling was employed as a writer, first by Fox Films and thereafter by its successor, 20th Century Fox.

A. True.

Request No. 5. In 1939, Sperling's status at 20th Century Fox was changed to that of an employee producer. A. True.

Request No. 6. In 1939, Sperling was married to Miss Betty Warner, the daughter of Harry Warner.

A. True.

Request No. 7. The actual production of each of the pictures made by 20th Century Fox, in the making of which Milton Sperling was employed to act and did act as a producer, was not within his exclusive control.

A. True in part, the fact being that as to those pictures of which the defendant was the [548] producer, this defendant exercised the exclusive control customarily exercised by producers at said studio. All producers and all employees were subject to the studio head.

Request No. 8. The subject matter, the preparation of the screen play, the cutting and editing of each picture in the making of which Milton Sperling was employed by 20th Century Fox as a producer, were not within Sperling's exclusive control.

A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 9. The selection of the story upon which each such picture was based was not within Sperling's exclusive control.

A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 10. The selection of the person who was to function as the director of each such picture was not within Sperling's exclusive control.

A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 11. The selection of the persons who

were to star or play the leading roles in each of such pictures was not within Sperling's exclusive control. [549]

"A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 12. The selection of the cast of each such picture was not within Sperling's exclusive control.

A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 13. The preparation of the budget for each such picture was not within Sperling's exclusive control.

A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 14. The compensation to be paid to the director and to members of the cast of each such picture was not within Sperling's exclusive control.

A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 15. The selection of the title of each such picture was not within Sperling's exclusive control.

A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 16. The cost of the items which entered into the production of each such picture [550] both before and after the commencement of principal photography thereof, was subject to the approval of an executive or executives of 20th Century Fox.

A. True in part, and the answer to request No. 7 is hereby incorporated.

Request No. 17. As such producer, Milton Sperling was not authorized to purchase literary properties without first obtaining the approval of his employer. A. True.

Request No. 18. As such producer, Sperling was not authorized to employ writers to compose literary properties and/or develop screenplays without first obtaining the approval of his employer.

A. True.

Request No. 19. Between 1942 and September of 1945, Sperling was in the military service.

A. True.

Request No. 20. Prior to the incorporation of United, Sperling discussed the proposed formation thereof with Harry Warner and Jack Warner and with Joseph Bernhard. A. True. [551]

Request No. 21. Prior to the incorporation of United, Milton Sperling discussed with Harry and Jack Warner and with Joseph Bernhard, terms of a proposed contract between United and Warner.

A. True to the extent that prior to the date of incorporation this defendant discussed terms in broad outline. [552]

* * * * *

Request No. 26:

“On or before September 10, 1945, Sperling knew that Bernhard had obtained a commitment from the said John S. Bierwirth, that the said Bank would make loans to United on terms substantially

like those contained in the said agreement dated October 31, 1945.

“A. True except that this defendant did not know on or before September 10, 1945, the terms which would be contained in the agreement to be drawn.”

Request No. 27:

“On August 31, 1945, Sperling and Bernhard executed a stockholders agreement which is dated that day. “A. True.”

Request No. 28:

“Before the master contract was drawn, the substance of its provisions was agreed upon in oral discussions between Harry Warner, Jack Warner, Sperling, and Bernhard.

“A. True except that this defendant did not participate in all of the discussions concerning the proposed agreement.”

Request No. 29:

“At the time the master contract was signed, United’s total capital consisted of \$25,000 cash.

“A. True.” [554]

* * * * *

Request No. 32:

“On September 11, 1945, Sperling, acting on behalf of United, borrowed \$50,000 from Warner.

“A. True that said sum was borrowed, but said loan was made by Bernhard on behalf of United.”

* * * * * [555]

Request No. 34:

“Subdivision 4½ of paragraph Seventh (a) of the master contract provides:

‘Out of the gross receipts retained by the Company it shall pay to the Producer by way of reimbursement, a sum equal to all costs and expenses paid or incurred by the Producer in the production of each of the photoplays herein provided for, which costs of the Producer shall include a reasonable allowance for its operating and general overhead in connection with the production of each such photoplay. Such overhead shall include such reasonable executive salaries as the Producer shall pay to Joseph Bernhard and Milton Sperling and other production employees; provided, however, that any part of such salaries which may properly be charged to a picture as a ‘direct charge’ shall not be included in computing the Producer’s general overhead.’

Before the master contract was signed, Sperling did not indicate to either Harry Warner or to Jack Warner, in words or substance, what salaries he (Sperling) would consider ‘reasonable executive salaries.’ [556]

Before the master contract was signed, Sperling did not indicate to either Harry Warner or Jack Warner, in words or substance, what allowance he considered ‘a reasonable allowance’ for United ‘operating and general overhead.’ “A. True.”

Request No. 35:

“Before the master contract was signed, Sperling did not receive any communication from Warner which, in words or substance, set forth Warner’s definition in terms of dollars, of the word ‘reasonable’ in the paragraph quoted above.

“A. True.”

Request No. 36:

“The budget of each of the pictures which United has made under the master contract and its amendments was prepared by Sperling.

A. Not true. Said budgets were prepared by United and not solely by this defendant.” [557]

* * * * *

Request No. 41: [558]

“Before September 18, 1946, Sperling authorized Stanleigh P. Friedman to draw a written contract of purchase and sale of said 125 shares; the price, \$400,000 payable to Bernhard in cash simultaneously with the execution and delivery by Bernhard to Friedman of the said contract.

“A. True.”

* * * * *

Request No. 43:

“On or before September 18, 1946, Sperling caused to be delivered to Friedman a cashier’s check in the sum of \$400,000 drawn on The New York Trust Company. “A. True.”

Request No. 44:

“On September 18, 1946, Friedman delivered said cashier’s check to Bernhard and the latter delivered a signed copy of said contract to Friedman together with his (Bernhard’s) 125 share stock certificate, and his resignation as an officer and director of United. “A. True.”

Request No. 45:

“Before September 18, 1946, Sperling borrowed

the [559] \$400,000 referred to in the previous request from The New York Trust Company.

"A. True."

Request No. 46:

"Before September 18, 1946, Sperling executed his promissory note payable to The New York Trust Company in the sum of \$400,000. "A. True."

Request No. 47:

"Mrs. Betty Sperling, the wife of Milton Sperling, was either a co-maker with Sperling of said promissory note or the same was endorsed by her.

"A. Not true."

Request No. 48:

"On or before September 18, 1946, Mrs. Betty Sperling delivered to said bank collateral security, to secure the payment of the said promissory note.

"A. True." [560]

* * * * *

The Court: You may proceed.

Mr. Levy: The last request that I have read, your Honor, is No. 48. I proceed now to the reading of No. 49.

"Request No. 49. On or soon after September 18, 1946, Sperling told Harry Warner and Jack Warner in substance:

(a) That he purchased Bernhard's stock interest in United for \$400,000 cash;

(b) That he borrowed the money from The New York Trust Company;

(c) That he had executed his promissory note payable to the order of said bank;

(d) That Mrs. Betty Sperling had secured the

payment of the said note to the bank in the manner described in requests 45 to 48, both inclusive.

A. True except that with reference to subparagraph (d) of request 49, this defendant did not tell Harry Warner or Jack Warner that Mrs. Betty Sperling was a co-maker of said promissory note or that the same was endorsed by her.

Request No. 50. In December of 1946, Sperling transferred 62 of his shares of United capital stock to the Title Insurance and Trust [561] Company of Los Angeles as trustee, for the benefit of his and Mrs. Betty Sperling's minor children.

A. True.

Request No. 51. In or about December, 1946, Sperling told Harry Warner and Jack Warner that he had made the transfer of capital stock referred to in the previous request. A. True.

Request No. 52. Since September 18, 1946, Sperling has controlled the action of the Board of Directors of United. A. Not true.

Request No. 53. Since September 18, 1946, United's business policies were determined solely by Sperling. A. True.

Request No. 54. Since September 18, 1946, the persons who have composed United's Board of Directors were selected solely by Sperling.

A. Not true. The Directors have at all times since September 18, 1946 been elected by unanimous vote of all the stockholders.

Request No. 55."——

The Court: Before you proceed, am I correct in my recollection of the evidence that since Sep-

tember 18, 1946 [562] the sole stockholders in United have been the defendant Sperling and Title Insurance and Trust Company as trustee?

Mr. Levy: Yes, your Honor; that is the evidence.

“Request No. 55. Since September 18, 1946, the persons who have been officers of United were selected solely by Sperling.

A. Not true. The officers have at all times since September 18, 1946 been elected by the unanimous vote of the Board of Directors.

* * * * *

Request No. 58. Whether any literary property purchased by United or otherwise acquired by it should or would be abandoned and written off by United as worthless, was determined solely by [563] Sperling, since September 18, 1946.

A. True.

Request No. 59. Sub-paragraph 6 of paragraph Seventh (a) of the master contract provides as follows:

‘The Producer may, from time to time, in preparation for production and during the course of production, incur contractual obligations as an incident to its activities herein provided for, and provided such obligations or commitments are incurred in connection with such production program, the company shall, weekly, on proper vouchers or billing from the Producer, reimburse the Producer for a sum equal to one-half of such obligations, * * *’

Since September 18, 1946, any and all contractual obligations incurred by United and any and all com-

mitments made by United which are referred to in the above quoted paragraph were determined to be so incurred and were determined to be so made, solely by Sperling.

A. True except for Warner budget approval with respect to each picture.

Request No. 60. Since September 18, 1946, [564] the amount of compensation to be paid to Sperling for services rendered by him to United was determined solely by Sperling.

A. True but said determination was subject to the provisions of the master contract.

Request No. 61. Since September 18, 1946, the compensation which United would agree to pay to its accountants, attorneys and all other persons in United's employ, was determined solely by Sperling.

A. True.

Request No. 62. Since September 18, 1946, the price of any item of property that United agreed to purchase or otherwise acquire was determined solely by Sperling. A. True.

Request No. 63. Whether a picture to be produced by United under the terms of the master contract as amended would be produced by United as an 'original' or as an 'additional' picture was determined solely by Sperling, since December 6, 1947.

A. True.

Request No. 64. Paragraph 5 of the amendment to the master contract, dated December 6, 1947 provides: [565]

'You agree that, prior to the commencement of the principal photography of any of the photoplays

hereinbefore referred to and about to be produced by you, you will advise us in writing whether the same shall be a remaining original photoplay or an additional photoplay, as hereinbefore referred to.'

The time, namely the day upon which (prior to the commencement of principal photography) United should or would advise Warner as to whether a picture proposed to be produced by United would be an 'original' or an 'additional' picture, was determined solely by Sperling, since December 6, 1947. A. True." [566]

* * * * *

Request No. 66:

"Before December 6, 1947, Sperling told Harry Warner that he (Sperling) was unwilling to proceed with the production of the pictures which then remained unproduced.

"A. True only to the extend that this defendant told Harry Warner that in view of uncertain business conditions he was temporarily unwilling to proceed." * * * * * [567]

Request No. 69:

"On or before December 9, 1947, Sperling, acting on behalf of United, and Harry Warner and/or Jack Warner, acting on behalf of Warner, orally agreed on the substance of the terms of the amendment to the master contract, which amendment is dated December 9, 1947. "A. True." [568]

* * * * *

The Court: December 9?

Mr. Levy: December 9.

The Court: Or December 6?

Mr. Levy: No; December 9. That is a further amendment to the master contract with reference to the picture Pursued.

The Court: You are referring now to which request?

Mr. Levy: I am referring now to Request No. 69.

The Court: That refers to what exhibit?

Mr. Levy: That refers to Exhibit No. 5 in evidence.

The Court: So stipulated?

Mr. Williams: So stipulated, your Honor. [569]

* * * * *

Request No. 71:

"Before July 20, 1950, Sperling, acting on behalf of United, and Harry Warner and/or Jack Warner, acting on behalf of Warner, orally agreed on the substance of the terms of the amendment to the master contract, dated July 20, 1950.

"A. True except that said agreement is dated July 21, 1950."

* * * * *

Request No. 73: [570]

"Before August 12, 1952, Sperling, acting on behalf of United, and Harry Warner and/or Jack Warner, acting on behalf of Warner, orally agreed on the substance of the terms of the amendment to the master contract, which amendment is dated August 12, 1952. "A. True."

Request No. 74:

"During Bernhard's connection with United, he

received approximately \$44,000 as compensation for services rendered by him. "A. True."

Request No. 75:

"During Sperling's connection with United, he has received in excess of one-half million dollars as compensation for services rendered by him to United, and for expenses. "A. True."

This exhibit, if the court please, is dated April 2, 1953. It is verified by the defendant Milton Sperling on the 6th day of April, 1953, before a Vice Consul of the United States. [571]

* * * * *

(The document referred to, and marked Plaintiff's Exhibit 113, was received in evidence.)

* * * * *

The Court: You may proceed, if you desire——

Mr. Levy: Yes, your Honor.

The Court: ——with the reading of the deposition of Samuel Carlisle, Exhibit 113 in evidence.

Mr. Levy:

"Deposition of Samuel Carlisle, a Witness Called By and in Behalf of the Defendants, Taken Pursuant to Stipulation Dated May 2, 1951, at 321 West 44th Street, New York, N. Y., on the 17th Day of May, 1951, Before Arnold Schubert, a Notary Public of the State of New York.

Appearances: Moss, Lyon & Dunn, Esqs., (310 West 7th Street, Los Angeles, California), Attorneys for the Plaintiff, By: Moroney, Ettinger & Pottish, Esqs., (271 Madison Avenue, New York, N. Y.) Sol Pottish, Esq., of Counsel. [575] Freston

& Files, Esqs., and Eugene D. Williams, Esq., (650 South Spring Street, Los Angeles 14, California) Attorneys for defendants Warner Bros. Pictures, Inc., Harry M. Warner and Jack L. Warner, By: Eugene D. Williams, Esq., of Counsel and Friedman & Bareford, Esq., (11 West 42nd Street, New York, N. Y.) and Joseph D. Karp, Esq., By: Joseph D. Karp, Esq., of Counsel. [576]

* * * * *

SAMUEL CARLISLE

59 Stratford Road, Rockville Centre, New York, called as a witness by the defendants, being first duly sworn by Arnold Schubert, a Notary Public of the State of New York, testified as follows:

Direct Examination

Q. (By Mr. Williams): What is your business address, Mr. Carlisle?

A. 321 West 44th Street, New York.

Q. What is your occupation?

A. I am Controller and Assistant Treasurer of Warner Bros. Pictures, Inc.

Q. How long have you been in the employ of that company? A. 25 years.

Q. Have you been Controller at all times during that period? A. Yes.

Q. Have you also been Assistant Treasurer at all times during that period? A. Yes.

Q. Do you occupy any other office in Warner Bros. Pictures, Inc.?

A. I am a director of the company, a member of the Board of Directors. [577]

(Deposition of Samuel Carlisle.)

Q. How long have you been a member of the Board of Directors of the company?

A. Since 1934.

Q. And that is continuously up to and including the present time? A. That's right.

Q. Your office and place of business is at the headquarters of the company in New York City, is it? A. Yes.

Q. Has it been your custom throughout the years since you have been a director to regularly attend all meetings of the Board of Directors?

A. Yes, I have attended them regularly.

Q. Do you have any business connection other than your association with Warner Bros. Pictures, Inc.?

A. None whatsoever.

Q. I desire to call your attention to a meeting of the Board of Directors of Warner Bros. Pictures, Inc., which was held on the 25th of September, 1945, and I ask you whether you were present at that meeting. A. Yes, I was.

* * * * * [578]

Q. (Continuing): That meeting was a meeting at which the resignation of Mr. Joseph Bernhard was submitted to the Board of Directors. Do you remember that?

A. He submitted his resignation, yes.

Q. At the time of the submission of the resignation, can you state whether there was or was not any statement made to the Board, or conversation among the members of the Board, as to the reason

(Deposition of Samuel Carlisle.)

why he was resigning from Warner Bros. Pictures, Inc.?

A. Yes, there was a question put by one of the members of the Board—I don't recall just which one it was—as to the reason, which was natural, and Mr. Albert Warner, who was Chairman of the meeting there, explained to him then about this U.S. Picture Company going to be organized.

Q. What did he say about it, as nearly as you can remember?

A. Well, he said that Milton Sperling was going to produce the pictures and they wanted to [579] have a business man in, and Joe Bernhard, with his wide experience in business, would make an ideal man for that job.

Q. Was that the substance of what was said with reference to what Bernhard was going to do, or the reason for his resignation at that time?

A. Yes, that was.

Q. Was there anything said at that time with reference to who Milton Sperling was?

A. Yes, the Major explained there that he was the son-in-law of H. M. Warner.

Q. Was anything said as to what his previous experience had been?

A. Yes. The Major gave some of his background.

Q. What, as nearly as you can remember?

A. He had produced several pictures successfully. I think he had been working for Fox for a number of years, 20th Century-Fox, that is.

Q. Now, have you, so far as you can remember

(Deposition of Samuel Carlisle.)

given the substance of what was said on both of those subjects at that time? A. Yes.

Q. Was there any dissent from the vote of the directors accepting the resignation?

A. No, there was none. [580]

Q. I now desire to call your attention to a meeting of the Board of Directors which was held just a few days later, on the 28th of September, 1945, and ask you whether you were present at that meeting? A. Yes, I was.

Q. I call your attention to the fact that at that meeting there was something that came up with reference to a contract between United States Pictures Inc., and Warner Bros. Pictures, Inc. Do you remember that occasion?

A. Yes. Major Warner introduced the matter and gave a little explanation, the same as he had done at the previous meeting, and turned it over to Stanleigh Friedman to explain the deal.

Q. Can you remember the substance of what Mr. Albert Warner said at that time, when he brought up the subject of this contract?

A. Well, it was somewhat the same as he had mentioned before.

Q. Well, just give us the substance of it, as well as you can.

A. That Milton Sperling had been a successful producer and that Joe Bernhard was going in with him because of his wide experience, and they [581] would make pictures to be distributed through Warner Bros. Pictures and its subsidiary companies.

(Deposition of Samuel Carlisle.)

Q. What was the substance of the statement made by Mr. Friedman at that time?

A. He had a synopsis of the contract before him there, and he read it off to the meeting there, stating the various terms of distribution and overhead being charged and the use of the Warner Brothers' facilities at the studio.

Q. Now, strain your memory and tell us, as nearly as you can remember, the substance of what he said about the various terms of that contract.

A. Well, they were to use various facilities at the studio, and the overhead was to be charged to them on the basis of a survey that had been made by Price, Waterhouse & Company prior to that time, and the distribution was substantially the same as in other contracts that had been made with other producers: 20 per cent for distribution in the United States, 25 per cent for England, and various rates for other countries.

Q. Was anything said as to the financing or the cost of making the pictures?

A. The cost of pictures, Warner Brothers [582] was to put up half, and U.S. Pictures was to put up the other half. They might do it by borrowing money from a bank, and if so, we would make arrangements there to pay the money over to the bank—that is, U.S. Pictures' share.

Q. U.S. Pictures' share?

A. I did not state before that the contract also provided for splitting the receipts after the costs had been recouped.

(Deposition of Samuel Carlisle.)

Q. In what proportion were the receipts to be split? A. Fifty-fifty.

Q. That is your recollection of the substance of what Mr. Friedman stated to the directors at that time?

A. Yes. There may be some other details that he went into. He had the contract before him.

Q. Was the contract itself physically present at that time in the room?

A. Yes, it was.

Q. I think you said also that Mr. Friedman had a synopsis before him?

A. Had a synopsis.

Q. Do you remember any of the directors having asked Mr. Friedman or anybody else any [583] questions about this contract, or the persons involved?

A. Yes, I remember, I believe it was Mr. Catchings, Mr. Waddill Catchings—I am not certain, but I believe it was Mr. Catchings that asked the question about whether U.S. Pictures could make pictures for distribution elsewhere and make those pictures on the Warner lot, and Mr. Friedman told him no, they couldn't make them for distribution elsewhere, they had to be made somewhere else.

Q. Were there any other questions that you remember, any other discussion that you remember?

A. Well, there was a lot of discussion, but that was the only really important point, I think, that was brought out.

(Deposition of Samuel Carlisle.)

Q. Do you remember the substance of any of the other discussion that was had at that time?

A. No, I do not.

Q. After this matter had been presented to the Board, did the Board act favorably upon it?

A. The Board passed the resolution.

Q. Was there any dissenting vote?

A. None. [584]

Q. I take it, then, that you voted for this resolution, as well as the one concerning the resignation of Mr. Bernhard on the previous meeting?

A. I did. I voted for both.

Q. Either before or during, or at any of those meetings at any time, did Mr. H. M. Warner, or Albert Warner, or any other person, make any statement to you with reference to the manner in which you should vote on these resolutions?

A. No, no one ever did. At no time during my term as a director has anyone ever told me how to vote.

Q. Prior to the vote at the directors' meeting on the 28th of September, 1945, prior to going to that meeting, had you been informed as to the fact that negotiations were in progress concerning such a contract as this?

A. I am quite certain that I knew it.

Q. In your vote on these two matters, that is, the resignation of Mr. Bernhard and the execution of this contract, did you exercise your own judgment as to how you should vote?

A. I did, but we have to rely to a certain [585]

(Deposition of Samuel Carlisle.)

extent on the judgment of the executives in charge of these operations.

Q. In that regard, did you rely upon the judgment of those who had been negotiating this deal and Mr. Friedman, who explained it? Is that correct? A. Yes.

Q. Now I call your attention to the fact that there was a meeting of the Board of Directors of Warner Bros. Pictures, Inc. held on the 23rd of November, 1945, at which, according to the records of that meeting, you were present; do you remember being present at that time?

A. Yes, I was.

Q. That was a meeting which involved, among other things, the authorization or the ratification of a small change concerning the financing of pictures under this United States-Warner Brothers agreement. A. Yes, that's right.

Q. Was that matter explained at that meeting?

A. Yes, it was. [586]

Q. In connection with your vote, did any person suggest or request that you should vote any way on that matter? A. No.

Q. I call your attention to a meeting of the Board of Directors that was held on the 18th day of June, 1946, at which, according to the record, you were present, and I will say for your information, so that you may identify the meeting, this was a meeting at which, among other things, there was passed upon the matter of an amendment to the basic contract between Warner Bros. and United

(Deposition of Samuel Carlisle.)

States Pictures with reference to one play Pursued. Does that sufficiently identify the meeting for you? A. Yes.

Q. You were present at that meeting?

A. I was present.

Q. Prior to the meeting had you had some knowledge of the subject of this picture Pursued?

A. Yes, I did. The lawyers had spoken about it.

Q. State what your knowledge on the subject of this amendment concerning the picture Pursued was at the time of the meeting.

A. My recollection is that they wanted to get Teresa Wright to play in that picture Pursued, and the [587] only way they could get her in was on a sharing agreement. They organized this Hemisphere Corporation, and they had to amend that contract. It changed our percentage of the overhead upward, and it changed our percentage of the distribution upward from 20 to 25, of which we retained two and a half, and U.S. Pictures got the other two and a half.

Q. Was there any change made in the amount of the net profit—the distribution of the amount of the net profit?

A. Yes. Instead of the fifty-fifty, it was changed to one-third to Warner Bros. and one-third to United States Pictures.

Q. Now, had you, prior to this meeting of June 18th, knowing of these facts, given any consideration to what effect that would have on the amount of profit that might be gained by Warner Bros.,

(Deposition of Samuel Carlisle.)

assuming the picture had a normal distribution?

A. Yes. I worked up some figures, or had them worked up by some of my assistants here, assuming in one case that the picture grossed two and a half million, and in another case if it grossed three million.

Q. And what was, in round figures, the result of your computation in that regard? [588]

A. I have the statements here. On the three million basis, it showed that Warner's share would be \$362,500, on the old basis, and on the new basis it would be \$308,166. That is the producer's share to Warner Bros. Pictures, Inc; that doesn't take into consideration the increase in the distribution, which would be—I am wrong, it does take it in.

Q. You also figured it on a two and a half million gross basis, did you not?

A. Yes, we figured it on that basis.

Q. Was anything said to you as to the reason why it was advisable or necessary to make a deal with—what amounted to a three-way deal with a corporation known as Hemisphere Pictures, and United States Pictures, and Warner Bros. Pictures in regard to this particular picture?

A. Well, we were given to understand that that was the only basis on which they could get Teresa Wright in the picture, and I think Niven Busch—I think he had the story.

Q. Well, Niven Busch is a writer?

A. Yes.

(Deposition of Samuel Carlisle.)

Q. And Teresa Wright, is she a well-known motion picture star? A. Yes. [589]

Q. At any rate, you had that information and had checked up and had made the compilations of figures on the assumption that the picture would gross either two and a half or three million dollars before the meeting of the directors was held on June 18th, had you?

A. Yes—June 18th?

Q. Yes.

A. It must have been before that. I have no date on my——

Q. Well, now, let us get to the meeting of June 18th and perhaps that will refresh your recollection. Do you remember this matter being brought up before the directors on June 18, 1946?

A. Yes.

Q. Who presented the matter to the Board?

A. That was Mr. Friedman.

Q. Did he make a statement with reference to the matter at that time?

A. He did. Now, I do not recall definitely whether he presented these figures to the meeting.

Q. Well, let me ask you this: Do you remember that he did make a statement with reference to the conditions to be attached to this picture, to the making of this picture? A. Yes. [590]

Q. Do you remember the substance of what he said?

A. He explained to the Board there that while we got the lower share of the net profits of the

(Deposition of Samuel Carlisle.)

picture, we also got a higher share in the distribution and also a higher overhead, and there was also an allowance of \$50,000 additional, which was provided in that contract that we got before the split.

Q. Was there anything said——

A. I say we got—that is, split between U. S. Pictures and Warner Bros. Pictures.

Q. Was there anything said at that time on the subject of whether Niven Busch would permit the story to be used or whether Teresa Wright would act in the picture on any terms other than this?

A. No. We were given to understand that that was the only conditions.

Q. Do you remember whether Mr. Friedman or you or somebody else presented to the Board the compilations which you had theretofore made?

A. No, I do not recall these figures being submitted to the Board. They may have been, but I do not recall.

Q. You just don't remember with reference to the matter one way or the other?

A. That's right. [591]

Q. When the vote was taken, did you vote favorably to this resolution? A. I did.

Q. At that time, or at any prior time, had any person made a statement to you with reference to which way you should vote on the matter?

A. No one ever suggested it.

Q. And your vote, when you did vote, was the exercise of your own judgment as to the propriety of the action, was it? A. Yes.

(Deposition of Samuel Carlisle.)

* * * * * [592]

Q. (By Mr. Williams): Now, Mr. Carlisle, you have examined this contract of December 6, 1947, which I have described, and I ask you whether on or about, or shortly after the date of this contract, the fact of it having been executed on behalf of Warner Bros, was brought to your attention as Controller of the company?

A. Yes, a copy of it was sent to me about the latter part of December, 1947.

Q. Thereafter did you take any action with reference [593] to having the auditing and accounting division of the company——

A. Yes, in the ordinary course the copy was passed through so as to set up the records there to furnish all the statements, et cetera.

Q. Did you observe as to what the terms in general of this contract of December 6, 1947, were?

A. In general it provided for making an additional four pictures on different terms. The overhead was to be charged on the same basis as we charge all other pictures at the studio produced for our own use. The split of the profits after we had recouped our cost was increased from 50 to 80 per cent for Warner Bros. and reduced from 50 to 20 per cent for U.S. Pictures. I do not recall if there were any other changes.

Q. Do you remember if there was any change with reference to the distribution fee?

A. Yes. That was changed from 20 to 25 per cent.

(Deposition of Samuel Carlisle.)

Q. That was for domestic distribution?

A. For domestic, and the foreign was upped also. I don't recall just now.

Q. Do you remember whether there was any change with reference to the cost of production of the pictures?

A. The cost of production was to be entirely financed by Warner Bros. Pictures. [594]

Q. Whereas, under the previous one, it was fifty per cent? A. Fifty-fifty.

Q. You then became aware of those changes through reading a copy of this contract, which was sent to you at about the time the contract was executed? A. Yes.

Q. I call your attention, Mr. Carlisle, to a meeting of the Board of Directors of Warner Bros. Pictures, Inc., held on the 17th of August, 1950, at which, according to the record of the meeting, you were present, and which considered, among other things, the matter of the contract between United States Pictures and Warner Brothers. Do you remember having been present at that meeting?

A. Yes, I do.

Q. I will ask you whether, in the meantime and shortly before that meeting, there had been brought to your attention the fact that it was contemplated that there should be another amendment to the basic United States Pictures-Warner Bros. contract providing for additional pictures?

A. I had heard that, yes.

Q. At the time of the meeting of the 17th of

(Deposition of Samuel Carlisle.)

August, 1950, at the meeting of the directors, did any [595] person bring that matter up before the directors?

A. Yes, I believe it was Mr. Bareford, Harold S. Bareford.

Q. Mr. Bareford is not a director of the company, is he?

A. Not of Warner Bros. Pictures, Inc.

Q. But he was present at the meeting?

A. He was present at the meeting. He usually is present.

Q. And he is one of the attorneys for Warner Bros. and also an Assistant Secretary?

A. He is an Assistant Secretary.

Q. Will you state what, in substance, Mr. Bareford stated to the Board at that time with reference to this second amendment to the basic agreement?

A. Under the basic agreement, three pictures had been produced, and there were three more to be produced. This provided for an extension—I don't recall what the extended time was—an extension on producing those three pictures, and it also provided for making three additional pictures.

Q. The original contract, as you say, called for six pictures? A. Yes.

Q. The first amendment called for four additional pictures? A. Four additional.

Q. Did this amendment provide for three additional pictures in addition to the four?

A. Yes.

Q. Making altogether 13 pictures?

(Deposition of Samuel Carlisle.)

A. 13 pictures.

Q. Did Mr. Bareford state that to the directors?

A. Yes, he did.

Q. What did he state with reference to the conditions under which the other three pictures were meant to be produced?

A. I don't just recall now what he said. I believe those three pictures there were to be on the same basis as the others, as in the four pictures.

Q. I show you a copy of the minutes of the special meeting of Warner Bros. Pictures, Inc., held on the 17th of August, 1950, and ask you to examine so much of it as is necessary to refresh your mind, and particularly the last page which [597] refers to this matter.

A. Yes, all to be produced prior to January 1, 1953.

Q. By refreshing your recollection, you now remember more of the details of that matter as it was brought before the Board of Directors?

A. Yes.

Q. Have you examined the minutes?

A. Yes."

May I pause at this point, your Honor, to say that the minutes of the meeting of August 17, 1950 are in evidence in this case as Exhibit No. 23?

The Court: So stipulated?

Mr. Williams: So stipulated, your Honor.

Mr. Levy: "Q. Have you examined the minutes?

A. Yes.

(Deposition of Samuel Carlisle.)

Q. Did they appear to be correct minutes of that meeting as you recollect it? A. Yes.

Q. In so far as it refers to this matter?

A. Yes, that's right. [598]

Mr. Williams: May we have this copy of those minutes attached to the deposition, marked as Defendants' Exhibit No. 1 for identification in connection with the deposition?

Mr. Pottish: No objection.

Mr. Williams: And the only portion of the minutes which I am really interested in is the portion showing who was present and the portion of the last page of the minutes which shows the action with reference to the United States Pictures-Warners contract."

The reporter's note proceeds, in parentheses, as follows:

"Copy of minutes of meeting of Board of Directors of Warner Bros. Pictures, Inc., held on the 17th of August, 1950, was marked Defendants' Exhibit 1 for identification.)"

Mr. Williams proceeds as follows:

"Q. (By Mr. Williams): Mr. Carlisle, was a vote taken on this matter? A. Yes.

Q. Did the directors vote to approve the contract? A. They did. [599]

Q. You, yourself, I take it, voted in the affirmative? A. Yes, I did.

Q. Did any person, either before or during that meeting, at that time say to you in what way you should vote on that matter? A. No.

(Deposition of Samuel Carlisle.)

Q. When you voted, did you do so in the exercise of your independent judgment as to how the matter should be voted?

A. Yes, I did.

Q. Mr. Carlisle, in the number of years that you have been a director of Warner Brothers, has either Albert or Harry or Jack Warner, or any other person purporting to speak for them, directed you as to how you should vote on any matter which came before you as a member of the Board of Directors?

A. No, no one has either directed me or even suggested to me.

Q. That includes all of these matters involved in the United States Pictures deal?

A. Yes, it does. * * * * * [600]

Cross Examination

Q. (By Mr. Pottish): Referring to that meeting of September 25, 1945, you told us that Major Warner announced the resignation of Mr. Bernhard. A. Yes.

Q. Was it also Major Warner at that meeting who stated the reasons to the meeting for Mr. Bernhard's resignation, and stated the background of Mr. Sperling? [601] A. Yes.

Q. Did you have any independent knowledge, besides Major Warner's statement of Mr. Bernhard's reasons for his resignation?

A. No, that's all. * * * * * [602]

Q. In any event, did you cause any independent

(Deposition of Samuel Carlisle.)

investigation to be made concerning Mr. Sperling's background or experience prior to that meeting of September 25th?

A. No. As I say, we rely on the judgment of the executives in charge of that particular end of the business.

Q. Yes, you stated that, and when you say you relied on the executives in charge of that branch, to whom specifically do you refer?

A. Jack Warner is in charge of production, and H. M. Warner is in charge of everything—he is the President of the company.

Q. Of what?

A. Of everything; he is President of the company.

Q. So you relied principally on the recommendations of Jack and H. M. Warner in these connections concerning Mr. Sperling?

A. And what I had seen in trade papers occasionally. * * * * * [603]

Q. Did Major Warner, in announcing these facts on that meeting of September 25th, state that he thought Mr. Bernhard going with Mr. Sperling would be a good combination?

A. That is my recollection. * * * * *

Q. Did Major Warner say that the Bernhard-Sperling combination would be of any benefit to Warner Brothers?

A. He might have said so as an independent producer, producing pictures for Warner Brothers.

Q. Was it stated at that meeting of September

(Deposition of Samuel Carlisle.)

25th that the combination of Sperling and Bernhard would become independent producers of pictures for Warner Brothers?

A. At the meeting of the 25th?

Q. Yes. [604]

A. Well, I believe it was stated that that was what they had in mind.

Q. And this was all stated by Major Warner?

A. Yes.

Q. Well, coming forward to the meeting of September 28, 1945, in which you say the contract between United States Pictures and Warner Brothers was approved——

A. Yes.

Q. I believe you testified that Major Warner gave some explanation of the deal, and then Mr. Friedman gave the balance of the explanation of the deal.

A. Yes.

Q. Prior to that meeting had you seen a draft of the contract which was being approved?

A. No, I don't think I had, sir.

Q. And did you in a great measure rely upon the recommendations of Major Warner and Mr. Friedman in connection with the vote at that meeting on that contract.

A. We accepted their explanation of the contract. * * * * * [605]

Q. Do you recall whether at that meeting the contract itself was passed around to all directors present for examination?

A. I am pretty certain it was not.

(Deposition of Samuel Carlisle.)

Q. Was it mentioned at that meeting that Milton Sperling was the son-in-law of Mr. Warner?

A. Yes. While I said that I am pretty certain the contract was not passed around, the contract was always on the table available for anyone who wished to look at it. That is the usual procedure.

Q. You say the explanation of the contract at the meeting was provided by both Major Warner and Mr. Friedman?

A. The Major just told in very general terms what the deal was there and turned it over to Stanleigh Friedman to explain the contract.

Q. And did you rely in a great measure on the explanation, on the introductory statement made by Major Warner and the subsequent more detailed explanation given by Mr. Friedman?

A. Yes. * * * * * [610]

Q. Do you recall who made the recommendation at the meeting of September 25, 1945, regarding Bernhard's resignation and his going into business with Sperling?

A. That would be Major Warner.

Q. Was it also Major Warner that made the recommendation at the meeting of September 28, 1945, regarding the approval of the contract with U.S. Pictures?

A. Yes.

Q. Am I correct in assuming that Major Warner is Mr. Albert Warner?

A. Albert Warner, Vice-President and Treasurer.

Q. Let us go on to the contract of December 6,

(Deposition of Samuel Carlisle.)

1947. Do I understand correctly that there was no meeting of the Board of Directors to approve or disapprove this contract?

A. Apparently it was not approved.

Q. It was simply made by the officers of the company? A. Yes.

Q. And you thereafter saw a copy of that contract?

A. Yes, I received it in the same month in which the contract was drawn. [617]

Q. You received it the latter part of December, as I recall your testimony.

A. The 26th of December, to be exact.

Q. You had no say in whether or not that contract should or should not have been made prior to its execution? A. No.

Q. Coming down to the directors' meeting of August 17, 1950, at which you testified the directors passed on a further amendment to the basic agreement. Do you have any independent recollection or any notes which indicate to you whether or not you saw a copy of that proposed amendment prior to that directors' meeting?

A. I have no notes, but I had heard it in discussion amongst ourselves. [618]

Q. At the meeting, who presented that amendment? I withdraw that.

I have here a record that Mr. Bareford——

A. Mr. Bareford explained it.

Q. Explained the amendment at the meeting?

A. Yes.

(Deposition of Samuel Carlisle.)

Q. Did he make a recommendation with regard to it? A. No, I don't think so.

Q. Was there any executive of the company that made a recommendation regarding that amendment at that meeting?

A. I would assume that Major Warner recommended it as being the opinion of the studio executives.

Q. He is in charge of that phase of it, Major Warner?

A. No, he is the Treasurer. Jack Warner is in charge of the studio, but he is very seldom at our meetings.

Q. Did you rely to some measure upon the recommendations of Major Warner and upon the explanation of the amendment as made by Mr. Bareford before arriving at your vote?

A. Yes. Major Warner generally passes [619] along to us the opinions of his brothers as to the collective opinion.

Q. He represents his brothers at the meetings?

A. Yes.

Q. In that way, all the brothers do not have to be present at the meetings?

A. Well, it isn't for that reason they stay away. They are out on the Coast.

Q. Well, these meetings were held in New York?

A. They were held in New York.

Q. And Major Warner was the Warner brother that was here at those meetings?

A. His headquarters are in this office.

(Deposition of Samuel Carlisle.)

Q. When he makes these recommendations, he makes it understood that he is speaking for the three Warner brothers?

A. Well, we all accept it that way.

Q. Did you, prior to approving the amendment agreement of August 17th that was presented at the meeting of August 17, 1950, investigate whether at that time the distribution percentage to the Warner Bros., distribution Company was a fair one?

A. Yes. I didn't investigate; just from general knowledge. [620]

Q. Are you familiar with the records of the distribution company? Does that come within your jurisdiction as Controller? A. Yes.

Q. Do you know whether they were making a profit under that distribution fee of 20 per cent?

A. It is very hard to say whether you are making a profit on an individual picture. We have our branches all throughout the country, and the overhead runs on whether you have 15 pictures or 20 pictures; so that the more pictures you have, the lower the overhead is on all of them.

Q. Well, did you have prepared for yourself any analysis which would allocate to these pictures being produced by United States Pictures a percentage of the total overhead of the distribution corporation so that you could figure out whether the distribution corporation was making a profit on this distribution contract?

A. The distribution company for a number of years has made a profit on the 20 per cent that we

(Deposition of Samuel Carlisle.)

allow them for distributing Warner Brothers pictures and all other pictures.

Q. And no other pictures?

A. All other pictures.

Q. And all other pictures? [621]

A. Yes.

Q. Did you ever investigate as to whether they would, after analysis, be making a profit only with respect to the United States Pictures' pictures?

A. There was no way of finding that out.

Q. Well, isn't there a way of allocating the United States Pictures' overhead as against the rest of their overhead?

A. You can do so, but it isn't quite satisfactory. You still have that overhead running on.

Q. At whose instance were you elected a director of this company, Mr. Carlisle?

A. Mr. Warner.

Q. Which Warner?

A. H. M. Warner.

Q. I take it that as annual elections of directors take place, why, the directors are nominated by a group, a committee?

A. It is generally Mr. Warner there that is asked if he wishes to make any changes.

Q. And he, in effect, controls the naming of the Board of Directors, does he not?

A. That is, those inside the organization.

Q. Yes. And you are mindful of that?

A. Yes. [622]

Q. Mr. Warner and his two brothers in effect

(Deposition of Samuel Carlisle.)

control, do they not, whether or not you shall stay on as Controller or Assistant Treasurer of the company? A. Certainly. * * * * *

Q. Did you exercise any surveillance over the administration of the contract between Warner Brothers and United States Pictures regarding the amount of overhead charges which were being charged by United States Pictures?

A. That is done at the Coast.

Q. You exercised no surveillance on that?

A. No.

Q. You were unaware at the time you voted for the amendment in August of 1950, as to how that portion of the contract was being administered.

A. Well, I do know that they watch it closely and check up on it. [623]

Q. Yes, but you personally have no knowledge of that administration? A. No."

* * * * * [624]

Mr. Levy: I will call Mr. Roy Obringer.

ROY JOHN OBRINGER

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Will you state your name to the court?

The Witness: Roy John Obringer.

Direct Examination

Q. (By Mr. Levy): Mr. Obringer, are you the Obringer who signed and who verified the inter-

(Testimony of Roy John Obringer.)

rogatories addressed to Warner Bros., copies of which I will show you in evidence in this case as Exhibits 104-A and 107? A. Yes, sir.

Q. You are Assistant Secretary of Warner Bros. Pictures, Inc.? A. I am.

Q. Are you an employee of Warner Bros?

A. Yes, I am. * * * * * [626]

Q. What are you duties, generally?

A. I am the resident attorney of Warner Bros. Pictures, Inc., at its studio at Burbank, California, having administration of the contract department.
* * * * * [627]

Q. (By Mr. Levy): Mr. Obringer, you were asked the following question——

Mr. Williams: What page?

Q. (By Mr. Levy): I am referring now to page 2 of Exhibit 107, subdivision “(h) State the dates and amounts of cash loans or advances (if any) made by Warner to United in connection with the production of said picture;”

And your answer was: “None; however, Warner made cash loans for general purposes as follows: September 11, 1945, \$50,000; February 15, 1946, \$100,000.” [634]

I ask you, Mr. Obringer, what you meant by the words “general purposes” in your answer?

A. The figures which you have quoted were obtained by me from the accounting department. And, may I see the question, please?

Mr. Levy: Yes.

The Court: The clerk will place the original ex-

(Testimony of Roy John Obringer.)

hibit before the witness. What is its number, 107?

Mr. Levy: 107, your Honor.

The Court: Interrogatories, is it not?

Mr. Levy: Interrogatories, yes, your Honor.

The Witness: I am unable to answer the question. * * * * * [635]

Q. Does your answer hold good with respect to the \$100,000 loan? A. It does.

* * * * * [636]

Mr. Levy: May I at this time, your Honor, read into the record the deposition of the plaintiff Edward S. Birn? It is Exhibit 22 in evidence.

The Court: You may. Exhibit 22?

* * * * * [657]

DEPOSITION OF EDWARD S. BIRN

Mr. Levy: "Deposition of Plaintiff Edward S. Birn taken at the office of Moroney, Ettinger & Pottish, 271 Madison Avenue, New York, New York, on May 21, 1951, at 10:30 a.m. pursuant to stipulation made among the attorneys for the respective parties dated May 2, 1951.

"Present: Edward S. Birn, Plaintiff. Sol Pottish, Esq., of Moroney, Ettinger & Pottish, 271 Madison Avenue, New York, attorneys of counsel for Moss, Lyon & Dunn of 210 West 7th Street, Los Angeles 14, California, attorneys for the plaintiff. Eugene D. Williams, Esq., of counsel for Freston & Files and Eugene D. Williams of 650 South Spring Street, Los Angeles, 14, California, attor-

(Deposition of Edward S. Birn.)

neys for defendants Warner Bros. Pictures, Inc., Harry M. Warner and Jack L. Warner, Joseph D. Karp, Esq. of Friedman & Bareford of 11 West 42nd Street, New York, New York, of counsel for [658] defendants Warner Bros. Pictures, Inc., Harry M. Warner and Jack L. Warner. * * * * *

“The plaintiff, being first duly sworn, testified as follows:

Q. (By Mr. Pottish): Mr. Birn, at the time of the commencement of this suit in 1948, were you the owner of 400 shares of stock of Warner Bros. Pictures, Inc.? A. I was.

Q. Had you continuously been the owner of those shares of stock since August 21, 1944?

A. I have been continuously the owner of these 400 shares but I sold 200 shares about the early part [659] of May, 1951.

Q. So that at this time you are the owner of the 200 of the original 400 shares? A. Yes.

Q. Do you recall bringing a law suit in the State of California on behalf of the stockholders of Warner Bros. Pictures, Inc. against the officers and directors for a claim of wrongdoing on their part in connection with certain contracts and dealings between Warner Bros. Pictures Inc. and United States Pictures Inc.?

A. I do. I believe our suit was started in December 1948.

Q. Do you recall the transactions complained about in that law suit had their inception in a contract made between Warner Bros. Pictures Inc.

(Deposition of Edward S. Birn.)

and the United States Pictures Inc. in September 1945?

A. In 1948 I found out the facts but in 1945 I did not know them. * * * * * [660]

Q. When did you first learn of that contract or of any dealings between United States Pictures Inc. and Warner Bros. Pictures, Inc.?

A. In late September or early October in 1948, I overheard a conversation in a broker's office that Warner Bros. was being sued for some very large sums of money. I injected myself in this conversation but was not able to get all the facts. I then contacted Harry Ettinger who I have known for many years and asked him whether he would investigate and see whether there was anything to it. * * * * * [661]

Q. As a result of that conference with Mr. Ettinger, did you authorize the bringing of a law suit against United States Pictures Inc. and the directors and officers of Warner Bros. Pictures?

A. I did." [662]

"Q. And subsequently after that suit was brought in New York, did you authorize an additional suit to be brought in California?

"A. Mr. Ettinger explained to me that he could not serve the directors in New York and thought it would be necessary to bring a suit in California and I authorized him to do it.

"Q. Did you from time to time receive Proxy Statements and Notices of Meetings of Warner Bros. Pictures, Inc.?

(Deposition of Edward S. Birn.)

"A. I receive Proxy Statements from Warner Bros. and many others every day.

* * * * * [663]

"By Mr. Williams: What is your full name?

"A. Edward S. Birn. * * * * *

"Q. You are in the stock market as a business?

"A. No, sir.

"Q. And your purchase of Warner Bros. stock was a private investment of your own?

"A. That is right. * * * * * [664]

"Q. How many years have you been a stockholder?

"A. I have owned Warner Bros. stock fifteen to twenty years back to 1929.

"Q. During that time every year you have received, have you not, notice of Stockholders Annual Meeting and also Proxy Statement and Financial Statement from the company?

"A. I get them every day from Warner Bros. and many other companies.

"Q. Specifically from Warner Bros., a proxy statement, a proxy, a financial statement and a notice of stockholders meeting each year you have been an owner?

"A. I guess I did.

"Q. When you say you guess you did, you would not say that you did not receive them?

"A. I am sure they didn't single me out to omit me. * * * * * [665]

"Q. Mr. Birn, I show you a proxy which appears to be addressed to Edward S. Birn, 1450 Broad-

(Deposition of Edward S. Birn.)

way, which bears date January 14, 1946, and appears to be signed Edward S. Birn. I will ask you to state whether the writing January 14th and Edward S. Birn were written by you? [667]

“A. That is my signature. * * * * *

“Q. I also have a proxy addressed to Edward S. Birn, 1450 Broadway, New York City, which appears to have been dated in ink, January 23, 1947, and was signed Edward S. Birn in ink. I ask you whether you put in the ink date January 23 and the name Edward S. Birn in that proxy.

“A. That is my signature, the same as the other.

“Q. And you undoubtedly signed that proxy to Warner Bros.?

“A. Yes, I as a rule sign the proxy and save the company the expense of sending me a duplicate or a second request. * * * * *[668]

“Q. And do you expect personally to gain anything from the case other than your participation as a stockholder in the benefits to be received by the corporation, if any?

“A. No. I own too many stocks and have been hurt too often by unethical practices of directors and officers.

“Q. Do you have any agreement with Mr. Ettinger or his firm to the effect that you will participate in any fee which may be allowed by the court in case this action may be successful?

“A. I do not.

“Q. Do you anticipate or expect to gain any

(Deposition of Edward S. Birn.)

[670] advantage of any kind whatsoever other than the advantage that any stockholder may gain from whatever judgment might be derived in this lawsuit for the benefit of the corporation?

“A. I do not. * * * * *

“By Mr. Pottish: Q. When you authorized Mr. Ettinger to bring this lawsuit, did you authorize him to take any steps necessary to prosecute this case successfully?

“A. I did.

“Q. It is my understanding, Mr. Birn, that you told me that you had agreed with Mr. Ettinger by way of a gentleman's agreement that if he were unsuccessful in this lawsuit that you will figure out some reasonable compensation for the time he spent. Did you agree to such compensation?

“A. I did.

“Q. When you answered Mr. Williams a little while ago, you stated the only fee was to reimburse him for his expenses. [671]

“A. I overlooked that. Mr. Ettinger said it would be a reasonable fee and we would sit down and discuss it.

“Q. I show you Exhibit D, being proxy dated January 14, 1946, and ask you whether if at the time that proxy was before you for signature you knew about the claimed unethical and wrongful acts which you have alleged in your complaint, whether you would have signed this proxy and ratified the acts of the directors?

“A. Certainly I would not.”

* * * * * [672]

Signed “Edward S. Birn.”

“Sworn to before me this 12th day of June, 1951.

“Benjamin L. Hoch, Notary Public.

* * * * * [674]

Mr. Williams: If your Honor please, may I at this time offer into evidence the various documents which have [675] been identified as attached to the depositions as Exhibits A, B, C, D, and E?

The Court: Aren't they in evidence as part of the deposition?

Mr. Williams: Yes.

Mr. Levy: They are, and if they are not, I have no objection to the offer that is made.

The Court: I just want the record to be clear. I made an announcement on the record the other day that, in the absence of any objection or any exceptions to it, whenever any writing is offered in evidence which has some attachments to it, that the attachments will be deemed in evidence with the writing and bear the same identification in the record here under a sub-numbering or sub-lettering as they bear originally in the exhibit. For instance, Exhibit A to the Birn deposition would be in effect 22-A here in the record.

Mr. Williams: As long as there is no misunderstanding on it. I just wanted to be sure that the documents were in evidence.

And may I at this time, if it is convenient, call the court's attention to the fact that the Proxy Statement which is Exhibit A attached to the depo-

sition of Edward S. Birn which has just been read, on page 3 of that Proxy Statement there is a statement with reference to this transaction which is involved in this case. Would it be of convenience [676] to the court if I read it at this time, just one paragraph dealing with this transaction?

The Court: Yes.

Mr. Williams: It is headed "Transactions Between the Corporation and Directors.

"On September 28, 1945 this Corporation entered into an agreement with United States Pictures, Inc., of which Joseph Bernhard is President and owner of 50% of the stock, for the production of six feature motion pictures for distribution by this Corporation. Warner Bros. Pictures, Inc. does not own any of the capital stock of United States Pictures, Inc. The agreement provides generally as follows. The motion pictures are to be produced at the studios of this Corporation and this Corporation agrees to advance 50% of the cost of production of each motion picture by either cash, charges for talent and facilities furnished for the production of the motion pictures, or proportional charges for overhead of studios, etc. Subsidiaries of this Corporation will distribute the pictures throughout the world and retain from the gross proceeds certain direct expenses and certain percentages of the gross receipts of distribution which vary for different countries. United States Pictures, Inc. is required to provide [677] the other 50% of the cost of production of each of the motion pictures, and may borrow this and pledge as security therefor

the negatives, positive prints and all of the net proceeds of distribution after the deductions above referred to.

“On November 2, 1945, a loan agreement was entered into between The New York Trust Company, as lender, United States Pictures, Inc., as borrower, and this Corporation, for such part of the cost of production as may be borrowed by United States Pictures, Inc., which agreement provides for the pledge of the security referred to in the preceding paragraph. After such loans shall have been repaid and Warner Bros. Pictures, Inc. has been reimbursed for the amounts advanced by it, and then United States Pictures, Inc. has been reimbursed for the balance of the amounts advanced by it, then Warner Bros. Pictures, Inc. and United States Pictures, Inc. shall share equally in the remaining net proceeds of distribution.”

* * * * * [678]

(Plaintiff's Exhibits 37-A to 37-G, inclusive, for identification were received in evidence.)

Mr. Williams: If your Honor please, I may be in error, but I understood that the court was limiting the evidence at this time to the question of the applicability of the statute of limitations, and the matter that counsel just referred to obviously has nothing to do with that subject.

It doesn't make any difference to us personally whether we do or do not limit the evidence.

I just want to know where we stand on that subject.

Of course, your Honor, we anticipated and hoped for a judgment that would involve the merits of this case, but your Honor has very properly suggested that the matter might be disposed of on the applicability of the statute of limitations, and I understood at this time we were addressing ourselves to that one issue.

The Court: I want to try that issue first. The first issue in this case, as it is in every case in the Federal Court, is one of jurisdiction.

* * * * * [681]

Mr. Levy: I offer in evidence Exhibit 36-A, presently marked for identification, that being the minutes of the annual meeting of the stockholders of Warner Bros. held on the 18th day of February, 1947. Incidentally, might I ask Mr. Williams, have you the minutes for 1946? [712]

Mr. Williams: I don't think so.

Mr. Levy: This is the first set of minutes that——

The Court: Do you expect to offer all those minutes listed on page 6 of Exhibit 102?

Mr. Levy: Yes.

The Court: Then you offer Exhibit 36-A, the 1947 minutes; Exhibit 36-B, the 1948 minutes; 36-C, the minutes of the 1949 meeting; 36-D, the minutes of the 1950 meeting of stockholders; Exhibit 36-E, the minutes of the 1951 meeting; 36-F, the minutes of the 1952 meeting; and Exhibit 36-G, the minutes of the 1953 meeting of stockholders?

Mr. Levy: Yes, your Honor.

The Court: Any objection?

Mr. Williams: Yes, We object to them on the grounds they are not competent, relevant, or material, do not prove or tend to prove any issue involved in this case.

The Court: The objection is overruled. They are received in evidence.

(Plaintiff's Exhibits 36-A to 36-G for identification were thereupon received in evidence.)

* * * * * [713]

The Court: Very well. Please mark it Exhibit 120 for identification, the deposition of John Bierworth. Do you offer it in evidence?

Mr. Levy: Yes, your Honor. * * * * *

(The document was thereupon marked Plaintiff's Exhibit 120 and received in evidence.)

* * * * * [717]

DEPOSITION OF JOHN BIERWORTH

"Examination of Mr. John Bierworth as witness pursuant to stipulation between attorneys for respective parties, dated August 30, 1950, and subsequent adjournments made under said stipulation. The examination was held at the office of Mr. Bierworth, at National Distillers Corp., 120 Broadway, New York, New York, on November 3, 1950 at 2:30 p.m.

"Present: Mr. John Bierworth, Witness, Stanleigh Friedman, Esq., attorney for Mr. Bierworth, Joseph D. Karp, Esq., attorney of counsel for Warner Bros. Pictures, Inc. Sol Pottish, Esq., attorney of counsel for plaintiff.

(Deposition of John Bierworth.)

The witness, being duly sworn, testified as follows:

* * * * *

Questions by Mr. Pottish: [718]

Q. Between what dates were you director of Warner Bros. Pictures, Inc.?

A. I still am. November 23, 1945 to date.

Q. During what period were you a director of New York Trust Company.

A. September 19, 1941 to date.

Q. During what period of time were you an officer of New York Trust Company and what was that office.

A. Vice President, from October, 1929 to September, 1941; President from that date to, I think, November 9, 1949.

Q. Do you know Harry Warner, Jack Warner and Albert Warner. A. Yes.

Q. Did you know them prior to the time you became a director of Warner Bros. Pictures, Inc.

A. Yes.

Q. Have you known Milton Sperling since the date of your directorship in Warner Bros. Pictures, Inc.

A. You mean since I became a director or prior to that time.

Q. Was it prior to the time you became director of Warner Bros. Pictures, Inc. that you became director of Warner Bros. Pictures, Inc. that you [719] knew him. A. I think so.

Q. Do you know him to be a son-in-law of Harry Warner? A. Yes.

(Deposition of John Bierworth.)

Q. Were any or all of the three Warner brothers instrumental in effecting your election as director of Warner Bros. Pictures, Inc.

A. I don't know.

Q. Do you know who nominated you to be a director.

A. I don't know.

Q. Who notified you of your election as director.

A. The Board of Directors.

Q. Prior to your notification did you not know you were being elected.

A. You don't call up someone and tell him you are a director without first someone calling you up to ask if you would serve if elected.

Q. In this case you were asked prior to your election to serve by Harry Warner.

A. That is right.

Q. Subsequent to your election as a director of Warner Bros. Pictures did you attend every meeting [720] of the directors.

A. No.

Q. Do you have any recollection or record of just which meetings you did or did not attend.

A. The minutes would show that. I do not know.

Q. In what manner did you keep yourself informed of the affairs of the corporation subsequent to your election.

A. You could ask that about any company but could not answer it. You talk to the officers—you go to as many meetings as you can.

Q. Were most of your discussions concerning the company's affairs had with either or all of the three Warner brothers.

(Deposition of John Bierworth.)

A. No. I would say they were more with the treasury end of the business. Possibly with Stuart McDonald more than anyone else.

Q. Who was Stuart McDonald.

A. Assistant Treasurer.

Q. Subsequent to your election did you learn of an agreement which had been made between Warner Bros. Picture and United States Pictures, dated September 28, 1945 which concerned production of motion pictures by United States Pictures, Inc. using Warner Bros. Pictures' facilities. [721]

A. I learned of it prior to my election. Whether or not I had seen the specific agreement I do not know but the loan negotiations with the New York Trust Company were based on the assumption that an agreement embodying the features as outlined would be signed between United States Pictures and Warner Bros. Pictures.

Q. When you speak of loan by New York Trust you are speaking of a loan agreement which was signed on October 31, 1945, the parties to which were New York Trust, Warner Bros. Pictures and United States Pictures.

A. I do not know the date of that agreement but I am referring to the only agreement I know of between the two.

Q. That refers to loan to be made to United States Pictures to finance their production of pictures under their agreement with Warner Bros. Pictures.

A. I assume that is so.

(Deposition of John Bierworth.)

Q. Did you have any part in the negotiations leading up to that agreement. A. Yes.

Q. In what capacity did you act?

A. As President of New York Trust Company.

Q. Did you participate as President of New York Trust Company in the negotiation of the agreement made October 31, 1945 between New York Trust Company, Warner Bros. Pictures, Inc. and United States Pictures, Inc.

A. What agreement is that.

Q. Roughly, that agreement referred to a loan to be made by New York Trust to United States Pictures for the purpose of helping United States Pictures produce pictures under its agreement with Warner Bros. Pictures. A. Yes.

Q. As President of New York Trust were you in charge of all loan negotiations with moving picture companies?

A. As President of New York Trust I was in charge of everything, I presume. Not necessarily specifically. I knew of all loans made, of course.

* * * * *

Q. Did you take a personal participation in this loan agreement with United States Pictures, Inc.

A. Yes. [723]

Q. Did you investigate into the propriety of the basic agreement between Warner Bros. Pictures and United States Pictures before you approved the loan to United States Pictures.

A. I don't think I know what you mean by the propriety of it.* * * * *

(Deposition of John Bierworth.)

Mr. Levy: "Q. Did you investigate into the reasonableness of the agreement before you approved the loan to United States Pictures?

Objection by Mr. Friedman as calling for conclusion.

Mr. Karp: Same objection. (Not answered.)

* * * * * [724]

Q. Mr. Bierworth, I am not referring to the loan agreement. I am referring to the agreement between Warner Bros. Pictures and United States Pictures which had to be executed as a condition to your making the loan to United States Pictures and I ask you with respect to that agreement whether or not you investigated into its terms and knew of them fully before you approved the loan to United States Pictures.

A. I do not think I could answer that. I do not think I know.

Q. Did you actually read over the agreement between United States Pictures and Warner Bros. Pictures before approving the loan to United States Pictures.

A. I would doubt it because the usual method on a loan of this type is to turn it over to your attorney who sees if the papers are drawn in accordance with [725] the understanding.

Q. In making the loan were you concerned with the relative advantages to either United States Pictures or Warner Bros. Pictures under their agreement between themselves.

A. No. * * * * *

Q. Subsequent to your election as director of

(Deposition of John Bierworth.)

Warner Bros. Pictures did you exercise any surveillance over the administration of the agreement between Warner Bros. Pictures and United States Pictures. A. No.

Q. Subsequent to your election did you make a study of the terms of the agreement existing between Warner Bros. Pictures and United States Pictures and the amendments thereto.

A. No.

Q. Are you familiar with the loan agreements outstanding between Warner Bros. Pictures as a borrower [726] and a series of institutions including New York Trust Company which evidenced a loan in the original total amount of \$15,000,000.

A. I was at the time, as I arranged the loans.

* * * * *

Q. Were you familiar with the provisions of the loan agreements between Warner Bros. Pictures and New York Trust Company and other banks.

Mr. Friedman: Same objection." [727]

Mr. Williams: We waive the objection.

Mr. Levy: "A. In general I was familiar but I do not remember details. They were always handled by our attorneys.

Q. Specifically do you recall whether there was any provision included in the loan agreement between New York Trust Company and Warner Bros. Pictures to the effect that without the consent of 75% of the holders of Warner Bros. Pictures' notes, Warner Bros. Pictures could not pledge any of its

(Deposition of John Bierworth.)

assets or moving pictures or moneys due under contracts.”

Mr. Williams: The objections are waived, your Honor.

Mr. Levy: “Mr. Karp objected to this as improper in form and also on the grounds of being incompetent, irrelevant and immaterial.

“Mr. Friedman: I object on all the grounds interposed and on the further ground that the document speaks for itself. You asked if he was aware of it and I say the document speaks for itself.

A. I do not recall specifically. I would have to refer to the agreement. If it was in there I would have known at the time—if not I would not have known of it. * * * * * [728]

Q. In this particular case, Mr. Bierworth, tell us in your own words what considerations were given the greatest weight by you prior to your approval of the loan to United States Pictures.

Mr. Friedman objected to this question based upon the fact that it calls for mental conclusions and not statements of fact and therefore is objectionable. Same objection by Mr. Karp.”

Mr. Williams: We add to it the objection that it does not prove or tend to prove any issue in this case. It does not make any difference what the reasons which actuated the officers of the New York Trust to make the loan. The question is not relevant to any issue involved here. They could have made it for any one of a thousand reasons.

Mr. Levy: Well, in answer to Mr. Williams may

(Deposition of John Bierworth.)

I say this, your Honor: That the question has this bearing upon the total issue which is, has been and will be placed before this court, namely, whether or not the Warner Bros. in this case were the control of this corporation in essence and in reality, irrespective of the forms that either the board of directors went through or any of the officers or employees went through.

The Court: Overruled. You may read the answer.

Mr. Williams: Your Honor, this man was not an officer or an employee or a director of Warner Bros. [731]

The Court: Overruled.

Mr. Levy: "A. I think they are right. I think it is impossible to recall 5 years ago what my conclusions were. I think I can tell you in general, if you want to know what anyone's reasoning is that lends money." * * * * *

Q. Did you know at that time that United States Pictures were being capitalized with a capital of \$25,000.

A. If that was a fact I assume we did.

Q. You also knew at that time, did you not, that the principal officer of United States Pictures were Messrs. Milton Sperling and Joseph Bernhard.

A. Yes.

Q. Did their credit standing play any part in the question of whether the loan should be approved to United States Pictures. [732]

A. I cannot recall.

(Deposition of John Bierworth.)

Q. Is it not a fact that the New York Trust Company also considered, prior to approving the loan, the fact that the loan would be repaid out of the proceeds of the motion pictures to be produced under the agreement between United States Pictures and Warner Bros. Pictures.

A. That is right.

Q. Would you say that principal consideration was given by you to the latter fact as the basis for extending the loan to United States Pictures—the latter fact referred to being the fact that the loan would be repayable out of the proceeds of the moving pictures to be produced.

A. Yes.

Q. Would you have agreed to make a loan agreement of that size with United States Pictures in the absence of Warner Bros. Pictures being a party to the agreement.

A. Yes.

Q. Do you recall who handled the negotiations for the loan agreement on behalf of United States Pictures.

A. Bernhard.

Q. Do you recall who handled the negotiations [733] for that loan on behalf of Warner Bros. Pictures.

A. No.

Q. That loan agreement to United States Pictures was not the only loan ever negotiated by you to a moving picture company.

A. No.

Q. Has it been customary or usual in your practice as president of the bank to extend loans to a moving picture company for the entire cost of production of a movie.

(Deposition of John Bierworth.)

Mr. Friedman objected to this as irrelevant, incompetent and not within the issues of this action as set forth in the complaint and answer.

Mr. Karp objected to this as improper in form.

Mr. Friedman instructed witness not to answer." And we proceed to the next question.

"Q. During the existence of the loan agreement, did you ever familiarize yourself either as president of the New York Trust Company or as director of Warner Bros. Pictures with the salary that Sperling was receiving in his connection with United States Pictures. A. No.

Q. Did you in those capacities ever investigate [734] or attempt to determine the manner in which the contract between United States Pictures and Warner Bros. Pictures was being administered.

A. No.

Q. At any time during the existence of the loan agreement did the bank attempt to regulate the amount of salaries or overhead being incurred by United States Pictures.

A. Not to the best of my knowledge.

Q. Is United States Pictures a depositor in New York Trust Company.

A. I do not know. * * * * * [735]

"Q. The same question as to Warner Bros. Pictures.

"A. Yes. They are and were a depositor.

"Q. The same question as to any of the three Warner brothers.

"Mr. Friedman objected to this on ground ques-

(Deposition of John Bierworth.)

tion is irrelevant, immaterial, and privileged and he moves to strike out the question and instructs the witness not to answer. Mr. Karp made the same objection."

Now, may it please the court, preceding Mr. Friedman's objection, that is to say, as the deposition exhibits the fact, in between the line on which the question is written and the line on which Mr. Friedman's objection is noted as aforesaid, the witness has apparently, before he signed and swore to this deposition, made the following answer, and this is written in ink:

"A. Banks don't give out confidential information."

I proceed with the reading of the next question:

"Q. As director of Warner Bros. Pictures, did you make any investigation to satisfy yourself whether or not in your opinion the agreement between Warner Bros. Pictures and United States Pictures was fair to Warner Bros. Pictures? [736]

"A. No.

"Q. Do I understand you correctly when I say that your testimony is that the loan agreement between New York Trust Company and United States Pictures, to which Warner Bros. Pictures was a party, was based upon and would not have been executed without the execution of the corollary agreement between Warner Bros. Pictures and United States Pictures for the production of movies?

"A. I think that you will find, if you refer to

(Deposition of John Bierworth.)

another question in which you asked me if I examined the credit of United States Pictures and would have made the loan without the Warner Bros. Pictures being party to the agreement, my answer was that I would. * * * * * [737]

It is signed "John E. Bierwirth.

"Witness.

And, "Sworn to before me this 30th day of November, 1950. Andrew A. Walls, Notary Public."
* * * * * [739]

Mr. Levy: I offer in evidence, your Honor, Exhibit 31 for identification, that being an agreement dated [761] August 31, 1945, between Joseph Bernhard and Milton Sperling. * * * * *

Mr. Levy: Yes, your Honor, a stockholders agreement between Bernhard and Sperling dated August 31, 1945. I offer that in evidence.

The Court: Any objection?
* * * * * [762]

Mr. Williams: It is objected to on behalf of the Warner defendants on the ground there is no foundation laid as to them. It has not been shown that it was called to their attention or that they were parties to the agreement or knew the contents thereof, and it is hearsay for that reason. * * * * *

The Court: The objection is overruled.

Exhibit 31 is received in evidence.
* * * * * [763]

DEPOSITION OF W. STEWART McDONALD

Plaintiff's Exhibit 114: Deposition of W. Stewart McDonald, a witness called by and in behalf of the defendants, taken pursuant to stipulation dated May 2, 1951, at 321 West 44th Street, New York, N.Y. on the 18th day of May, 1951, at 11:30 a.m., before Arnold Schubert, a Notary Public of the State of New York. * * * * * [784]

W. Stewart McDonald, called as a witness in behalf of the defendants, being first duly sworn, testified as follows: * * * * *

Direct Examination

Q. (By Mr. Williams): Mr. McDonald, what is your place of residence? [784-1]

A. Scarsdale, New York.

Q. What is your occupation?

A. I am Assistant Treasurer of Warner Bros. Pictures, Inc. I am a Vice-President of various theatre subsidiaries, a director of most of such theatre subsidiaries, and also an Assistant Treasurer of the theatre subsidiaries.

Q. You have been employed by Warner Brothers or one of the subsidiaries, one or more of the subsidiaries, for what length of time?

A. Since January 1, 1931.

Q. Prior to that time did you have any connection with Warner Brothers?

A. Yes, I did. I was with Goldman, Sachs & Company, and ever since December 1927, I have followed the affairs of Warner Brothers.

(Deposition of W. Stewart McDonald.)

From December, 1927, until the time I joined Warner, I was one of Goldman, Sachs & Company's representatives who frequently visited this office.

Q. Since you joined Warner Brothers have you made it a practice to attend the meetings of the Board of Directors of Warner Brothers?

A. I have. I did so before I joined Warner, also.

Q. You did that from the time in 1927 that you had the connection with Goldman, Sachs that you have referred [784-2] to? A. Yes, sir.

Q. You are not and never have been a director of Warner Bros. Pictures, Inc.?

A. That is correct.

Q. But you have made it a practice since 1927 to attend the meetings of the Board of Directors of that company?

A. Either late '27 or early '28.

Q. I will ask you whether you are the W. S. McDonald who is referred to in the minutes as being present at a number of the meetings?

A. I am.

Q. Mr. McDonald, do you have in mind the meeting of the 25th of September, 1945, at which there was presented to the Board the resignation of Joseph Bernhard? A. I do.

Q. You were present at that meeting?

A. I was.

Q. Can you state whether there was any statement made in connection with the presentation of his resignation as to why he was resigning from

(Deposition of W. Stewart McDonald.)

the positions of Vice-President and director of Warner Brothers?

A. Well, to the best of my recollection, and I am sure this was done, the Board was informed that Mr. Bernhard [784-3] was resigning in order to become affiliated with the new corporation, United States Pictures Company, or whatever the correct title of that company is.

Q. Was anything said as to what, if anything, United States Pictures was to do?

A. Yes. That corporation was being organized for the purpose of producing pictures which were to be distributed by the subsidiary of Warner Bros. Pictures, Inc.

Q. Was anything said at that time with reference to who else would be associated with United States Pictures?

A. Yes, Milton Sperling.

Q. Did you know at that time who Milton Sperling was? A. I did.

Q. Who was he?

A. Milton Sperling had been formerly affiliated with Fox Film and with other corporations. He was active in the production, writing and producing of motion pictures. He was the son-in-law of Harry M. Warner, President of Warner Bros. Pictures.

Q. Were all of these facts discussed at the directors' meeting at that time? A. Yes.

Q. You remember, do you, that that resignation of Mr. Bernhard was accepted at the meeting?

(Deposition of W. Stewart McDonald.)

A. That is right. [784-4]

Q. Was there any direction given by Albert Warner or anybody else, to any of the directors, as to how he should vote on that matter?

A. Well, that meeting, I believe, was merely to accept the resignation.

Q. Well, was there any direction given by Albert Warner or any other person as to how any individual director should or should not vote on that proposition? A. No direction.

Q. I now call your attention to a meeting of directors that was held on the 28th of September, 1945, at which it appears that you were also present, and I identify that meeting as being a meeting at which there was presented for action by the Board a contract between United States Pictures Corporation and Warner Bros. Pictures, Inc., in reference to the production and distribution of motion pictures. Do you remember that?

A. I do.

Q. Can you state who presented that contract to the Board?

A. I believe that Major Warner, as presiding officer, first referred to it and then it was discussed or presented more fully by Stanleigh Friedman.

Q. Do you remember whether at that time Stanleigh Friedman made statements which purported to be a recital [784-5] of the terms and conditions of the contract?

A. Yes, and I believe he had with him either a draft of the contract—I do not know if it was

(Deposition of W. Stewart McDonald.)

then in final form, but he at least had full details pertaining to such contract.

Q. Was there any discussion among those present as to the contract, its terms and advisability of having Warner Brothers enter into the contract?

A. Oh, yes. There was full discussion as to the terms and conditions of the contract.

Q. At that time was any director instructed as to how he should or should not vote on the matter?

A. No, sir.

Q. Did the directors vote unanimously to accept that contract?

A. It is my recollection they did.

Q. Do you remember now what the terms of that contract were?

A. Yes. Let me state this, that I have never read the contract or had occasion to read it. The contract related to six pictures to be produced by United States—what is it, Film Corporation?

Q. United States Pictures, Inc.

A. United States Pictures, Inc., to be distributed by the subsidiary of Warner Bros. Pictures, Inc., Warner [784-6] Bros. Distributing Corporation. Warner was to furnish 50 per cent of the financing. The subsidiary was to receive certain percentages for the distribution of the picture, certain charges were to be made in connection with such distribution, such as print costs, advertising, et cetera, and Warner was to share in 50 per cent of the profits of such pictures.

(Deposition of W. Stewart McDonald.)

Q. Those are the terms as you understood them, as stated at the meeting? A. That's right.

Q. Prior to the meeting of the 28th, the meetings of the 25th and the 28th of September, 1945, had you had any knowledge of the fact that such a contract as you have just described was in contemplation by Warner Brothers?

A. Yes, I did.

Q. Had you been out on the Coast immediately prior to that time?

A. I had. I left for the Coast the last part of August and returned around the middle of September.

Q. While you were at the Coast, had you had any conversation with any of the executives of Warner Brothers concerning this contract?

A. I did. I talked at that time to both Harry Warner, President, and Mr. Joseph Bernhard, who was still Vice-President of the corporation, during part of that time. [784-7]

Q. What was the substance of the conversation between yourself and Harry Warner at that time?

A. Harry Warner told me that he was negotiating with Milton Sperling to have him join our organization. He referred to the fact, which I had also known indirectly through other sources, that Milton had been a very successful producer and executive assistant at the 20th Century-Fox organization; that Zanuck, who was the head of production of Fox, wanted Milton to go back to Fox, but that Harry Warner was very desirous of having

(Deposition of W. Stewart McDonald.)

him join the Warner organization and that he was negotiating on behalf of the corporation whereby Milton would become affiliated with Warner Bros. Pictures.

He said that the only way in which he could arrange it would be a basis whereunder Milton would have a financial interest in the pictures produced, which would be done through the formation of a company to be owned partly by Milton. He said that there were several reasons why he was desirous of having him come in. First, his proven ability as a producer of pictures, and secondly the fact that he said he wanted to build up the manpower of the Warner organization.

He pointed out the fact that in case something might happen to Jack Warner that it was essential to have someone to back him up, in a secondary position, and he [784-8] was very desirous to strengthen our position in the producing organization by having Milton come in with the hope that he would develop so that he could take over Jack's position should something unfortunate happen to Jack.

He also told me this, which came up in the conversation with Joe Bernhard as well, that he was very desirous of having Mr. Bernhard become affiliated with United States Pictures, the reason being that Joe had proven business experience, he was a good executive, and that he thought it was very much to the benefit of the company if we could make a deal with the proposed new United States

(Deposition of W. Stewart McDonald.)

Pictures Corporation, which would have as its controlling stockholders, or most likely the sole stockholders, Milton Sperling, an experienced producer, and Joe Bernhard, an experienced business executive.

Q. This occurred while you were on the Coast and prior to the meetings of the 25th and 28th of September? A. Yes, sir.

Q. I call your attention to the fact that on the 23rd of November, 1925, there was a directors' meeting at which there was presented a short amendment to the contract with United States Pictures relating to the withholding of moneys from the United States Pictures for the purpose of reimbursing or paying loans which might be made by that company in connection with pictures. [784-9]

A. That's right.

Q. You remember the details of that matter?

A. Well——

Q. I mean, you remember that it was brought before the Board?

A. I remember that they wanted some amendment to the contract which would aid them in securing the loan from the New York Trust Company.

Q. And that had to do with the Warner Brothers paying the moneys directly to the New York Trust Company instead of——

A. To United States Pictures.

Q. That matter was explained at the Board meeting? A. It was.

(Deposition of W. Stewart McDonald.)

A. It was.

Q. And thereafter the Board approved?

A. Right.

Q. On the 18th of June, 1946, there was a meeting at which it appears that you were present and which involved the matter of an organization known as Hemisphere Pictures, United States Pictures and Hemisphere Pictures involved Niven Busch, the author of a motion picture called Pursued, and Theresa Wright, a screen star. Do you remember that matter having been brought before the Board? A. I do.

Q. Do you recall in general the action that was [784-10] sought from the Board with reference to that picture, Pursued?

A. Yes. I know there was a great deal of discussion to determine if it was to the financial advantage of the company to enter into this modification, for, if I recall correctly, United States Pictures, in making this deal, had to give a percentage of the profit of the picture to Teresa Wright and to the other members of her company, and in giving that percentage therefor in the stars contract and for the rights to the picture, it necessarily meant that the percentage of profits for Warner would be reduced.

It was pointed out, and figures were presented, to show that it was likely to the financial advantage of the company to enter into this modification, in view of the increased percentage terms which the company would receive as a distribution fee.

(Deposition of W. Stewart McDonald.)

Q. That matter was fully discussed by those present at the Board meeting, was it?

A. It was.

Q. And was it passed by the Board?

A. It was.

Q. Now, I call your attention to a contract which was dated December 6, 1947, and which, according to our records, was not at that time presented to the Board but which had to do with the making of four additional pictures, [784-11] which were called additional pictures in the contract, and which changed the terms of the contract with reference to those additional pictures so that Warner Brothers would pay the entire cost of production, the distribution charges would be raised from 20 to 25 per cent for domestic and also raised in England and throughout the other foreign distribution, and Warner Brothers should receive 80 per cent of the profit instead of 20 per cent. Do you remember the existence of that contract, to your knowledge on or about or shortly after December 6, 1947?

A. I remember that it was discussed with me before, while it was in negotiation. I cannot tell you what date it was. If the contract is dated December, 1947, I am sure that it was prior to that time.

Q. To your knowledge, with whom was it discussed and by whom was it discussed?

A. Well, I know that Mr. Schneider and Mr. Bareford worked on the contract. I think Mr.

(Deposition of W. Stewart McDonald.)

Friedman also worked on the contract. I may have discussed it also with Mr. Carlisle.

Q. You discussed it with those gentlemen, did you?

A. Yes. I had nothing to do with the negotiation of the contract, I mean the discussions were of a general nature. But I knew of it.

Q. Do you remember that later in July of 1950 there was a second amendatory contract providing for three [784-12] additional pictures to be made, that is, three in addition to the four provided for by the December 6, 1947, contract?

A. Yes, I recall that.

Q. Was that matter discussed in your presence and by you and by others with you prior to the time that it was presented to the Board of Directors? A. It was.

Q. Were you present at the meeting held on the 17th of August, 1950, at which time the amendment of December 6, 1947, and the proposed new contract of July 21, 1950, was presented to the Board and discussed and passed on by the Board?

A. I was at the meeting; I recall that.

Q. Do you remember whether at that time the matter was discussed by the Board and in the presence of the Board? A. It was.

Q. That action was approved by the Board, was it? A. It was.

Q. Was there any disagreement among the Board as to the advisability of approving that contract? A. There was not.

(Deposition of W. Stewart McDonald.)

Q. May I ask you, was there at any of these meetings any directions or instructions from Albert Warner or any other person to any member of the Board of Directors as to [784-13] how they should vote on any of the matters submitted to them?

A. No, sir. [784-14]

* * * * *

DEPOSITION OF ALBERT WARNER

Plaintiff's Exhibit No. 115: Deposition of Albert Warner, a witness called by and in behalf of the defendants, taken pursuant to Stipulation dated May 2, 1951, at 321 West 44th Street, New York, N. Y., on the 18th day of May, 1951, at 10:30 a.m., before Arnold Schubert, a Notary Public of the State of New York. [784-25]

* * * * *

ALBERT WARNER

called as a witness by and in behalf of the defendants, being first duly sworn by Arnold Schubert, a Notary Public, of the State of New York, testified as follows:

Direct Examination

Q. (By Mr. Williams): Your name is——

A. Albert Warner.

Q. Where do you live, Mr. Warner?

A. New York City.

Q. Are you connected with Warner Bros. Pictures, Inc.? [784-26]

A. I am, yes.

(Deposition of Albert Warner.)

Q. In what capacity?

A. Vice-President and Treasurer, director.

Q. How long have you been connected with that organization?

A. Since the inception of the corporation.

Q. Prior to that time you and your brothers, Harry and Jack, were in the motion picture business in partnership, were you not?

A. Yes.

Q. You have been in the motion picture business for how many years?

A. More than 45 years.

Q. You make your headquarters at the New York offices of Warner Brothers?

A. Correct.

Q. What are your specific duties in the company?

A. No specific duties; general overall executive, confining most of my activities to the New York end of it.

Q. Your brothers regularly make their headquarters at the studio in Burbank, California?

A. They do.

Q. And in the division of work, they look after the executive problems that arise on the Pacific Coast, and you take care of them here in New York? [784-27]

A. That is correct.

Q. You customarily attend the meetings of the Board of Directors of the company, do you not?

A. I do.

(Deposition of Albert Warner.)

Q. In cases when your brother Harry is not present, you customarily preside?

A. I do.

Q. Do you have in mind a meeting of the Board of Directors of the company which was held on the 25th of September, 1945, and which I will identify as being the meeting at which there was presented the resignation as an officer and director of Joe Bernhard?

A. Yes, I recall that meeting.

Q. Do you remember whether, at the time of the presentation of his resignation, there was any statement made by you or any other person present as to the reason why he was resigning from Warner Bros.?

A. Yes, to the best of my memory he was to join Milton Sperling in the United States Pictures.

Q. Were there any statements made as to what the United States Pictures would do, what business they would engage in?

A. The production of pictures.

Q. Was anything said with reference to whether Warner Bros. would have any connection with United States [784-28] Pictures or any contractual relations with them?

A. Yes, as distributors.

Q. Was that matter discussed among the directors at the meeting at which Bernhard's resignation was presented?

(Deposition of Albert Warner.)

A. Not in general. Some of the directors knew of it. I don't recall whether it was particularly taken up.

Q. Was Mr. Bernhard's resignation accepted at that meeting? A. It was.

Q. Now, three days later, on the 28th of September, 1945, there was a meeting held at which, among other things, there was presented to the directors a proposed contract between Warner Bros. and United States Pictures, Inc., providing for the production and distribution of motion pictures to be made by United States Pictures.

A. There was.

Q. You remember that? A. Yes.

Q. Did you present that contract to the Board?

A. I did.

Q. At the time you presented it to the Board, what if any statements did you make about the contract?

A. I told the directors that it was most advantageous for our company to secure the services of Milton Sperling, who was the producer in charge of the United States [784-29] Pictures. We planned on having a good piece of manpower at the studio so that in case anything happened to Jack Warner, my brother, that we would have somebody ready there to take over and carry on. That thought was in addition to the advantageous advantages of very good pictures that would lend a great deal

(Deposition of Albert Warner.)

of earnings to our theatres and to our overall distribution end of it.

Q. Was there anything said by you or anybody else on the subject of Milton Sperling being the son-in-law of Harry Warner?

A. They all knew that, I imagine.

Q. Was there any discussion at that time about the experience that Milton Sperling had had in producing motion pictures?

A. I explained to them the background he had had as a producer and the successful pictures that he had made.

Q. Do you remember now what pictures he had made?

A. Oh, it is very difficult to remember. One I remember is something about Tripoli, Sands of Tripoli——

Q. Shores of Tripoli?

A. Shores of Tripoli, or something like that, and his general professional experience with the Fox organization.

Q. Where the terms of the contract itself explained to the Board by any person there?

A. Mr. Friedman had a copy of the contract there. He [784-30] also had a resumé, a condensed resumé of the contents of the contract. That was thoroughly explained to the directors. There were copies there available for the directors to take and read. Whether they did or not, I don't recall.

Q. Well, after the statements that you had made and Mr. Friedman's discussion of the terms of

(Deposition of Albert Warner.)

the contract, was the contract approved by the directors? A. It was.

Q. Was there any dissent from that approval?

A. No.

Q. Did you, in connection with that contract or in connection with the prior resignation of Mr. Bernhard, direct or instruct any of the directors to vote in any particular way on either of those subjects? A. We never do that.

Q. You did not in this case? A. No, sir.

Q. Did you make any statement with reference to whether you and your brothers were favorable to the contract?

A. We were favorable to the contract.

Q. Did you make a statement to that effect to the directors? A. I must have. [784-31]

Q. I now direct your attention to the fact that a meeting of the directors was held on the 23rd of November, 1945—of course, you won't remember the date, but I am just calling your attention to the fact that there was a meeting held on that date, and on that date there was a short amendment of one paragraph of the agreement between United States Pictures and Warner Brothers presented to the Board for approval, and that particular amendment had to do with the fact that, there being bank loans by United States Pictures, it provided that Warner Brothers, out of the moneys coming in from the distribution of the pictures, should withhold certain sums that would otherwise be due to the United States Pictures and pay the bank

(Deposition of Albert Warner.)

loans with them. Do you remember the circumstances of that meeting?

A. Are you referring to the Teresa Wright-Busch——

Q. No, I am referring to just a little amendment clarifying the fact that Warner Brothers, from the money received from the distribution of the pictures, should first pay the bank loans that United States Pictures had made.

A. I don't recall the specific wording of that, but the minutes show that such a meeting took place.

Q. You were present at that meeting and voted in favor of it, although you do not now remember the details?

A. To the best of my knowledge, I was present.

Q. Now, on the 18th of June, 1946, there was presented [784-32] to the Board of Directors at a meeting a proposed amendment to the contract with reference to the picture Pursued, which was a picture written by Niven Busch and in which Teresa Wright was to appear, and they had a corporation known as Hemisphere Pictures.

A. Yes, I recall that.

Q. You remember that? A. I do.

Q. What, in effect, in substance, was that deal?

A. We were anxious that the United Pictures secure Teresa Wright in the Niven Busch *Prusit* Story. We saw the possibilities of a box office attraction of that kind, and our judgment was correct; it proved very successful.

(Deposition of Albert Warner.)

In order to make that possible, on account of the setup of the Fidelity Company and the setup of the United States Pictures, we had to make some modifications to permit such a deal to be acquired, and the net results of the change in the figures and percentages, whatever they were, came out just the same as if no changes were made. It was a move made necessary to secure the services of Teresa Wright and Busch in the picture *Pursued*.

Q. You personally were favorable to that amendment?
A. Very much so.

Q. Did you state the problem to the Board before they passed on it? [784-33]
A. Surely.

Q. Do you remember that that involved that Warner Bros. should receive one-third of the total profit instead of one-half, but that on the other hand the distribution percentage was increased with reference to that picture from 20 per cent to 25 per cent, and also the overhead to be charged by Warner Bros. for the use of its facilities was increased?

A. What ever the specific figures were, in the end they all came out the same as if those changes were not made. The distribution advance from 20 to 25 per cent was one item.

Q. Now, in connection with the voting on that amendment, did you dictate or direct any director how he should vote on the matter?

A. We never do those things.

Q. Well, without my asking you again, it is a

(Deposition of Albert Warner.)

fact, is it not, that in reference to every time when this United States Pictures contract was presented to the Board in any form, that there was never any direction by you given to any member of the Board as to how he should vote on the matter?

A. No. As I said, we recommend such propositions.

Q. But not directed?

A. Never directed. [784-34]

Q. I now call your attention to the fact that on the 6th day of December, 1947, there was an agreement made between Warner Bros. Pictures and United States Pictures, Inc., which provided for an amendment to the basic agreement under the terms of which United States Pictures were to make four additional pictures, and the conditions of making of those pictures were changed in several particulars: First, instead of putting up 50 per cent of the cost of production, Warners were to put up 100 per cent of the cost of production; second, instead of a distribution fee of 20 per cent domestic and 25 per cent British, and varying percentages for other foreign distribution, the distribution fee was to be 25 per cent domestic, 30 per cent British, and 30 per cent for the other foreign distribution; in the third place, the profits from the production of the pictures were to be divided, 80 per cent to Warner Bros. and 20 per cent to United States Pictures, instead of 50 per cent to each, as under the original agreement.

(Deposition of Albert Warner.)

Do you remember the circumstances of such a contract having been made?

A. Yes, I do.

Q. And do you remember that that contract was made in December of 1947, and are you aware of the fact that thereafter certain pictures were made pursuant to that amended contract? [784-35]

A. Yes, I do.

Q. Now, it just happens, Mr. Warner, that that contract was not presented to the Board of Directors for consideration at that time, but on the 21st of July, 1950, some little time later, there was a second amendment providing for three additional pictures, three more additional pictures on substantially the same terms as the pictures provided for under the agreement of December 6th and extending the time within which all of the pictures under all of the contracts should be made. Do you remember the circumstances of that agreement being made? A. I do in a way, yes.

Q. That agreement was presented to the Board of Directors at a meeting held on the 17th of August, 1950, and there was a great deal of business done at that meeting, but in particular I direct your attention to the last page, where the words beginning "The Chairman" in the paragraph that starts near the top, on down to the end of that page, recites the facts with reference to this matter. I ask you to read it.

A. (Reading): "The Chairman stated——"

Q. Well, read it to yourself.

(Deposition of Albert Warner.)

A. Oh, pardon me. (Perusing minutes.)

Q. Have you completed reading that, Major?

A. I want to read it over again. (Perusing document [784-36] again.)

Q. Major, you have read the portion of the minutes of the directors' meeting of August 17, 1950, referring to the second amendatory agreement between United States Pictures and Warner Bros. Does that refresh your recollection as to that matter having been brought before the Board of Directors? A. It was, yes.

Q. And did you present it to the Board?

A. I did.

Q. Did the Board pass favorably upon it?

A. They did.

Q. In your judgment at that time, was that good business for Warner Bros.?

A. It sure was.

Q. In your opinion, was this entire United States Pictures contract, including all of the amendments that were made, for the benefit of Warner Brothers? A. Substantially profitable.

* * * * * [784-37]

DEPOSITION OF WADDILL CATCHINGS

Plaintiff's Exhibit No. 116: Deposition of Waddill Catchings, a witness called by and in behalf of the defendants, taken pursuant to stipulation dated May 2, 1951, at 321 West 44th Street, New York, N.Y. on the 17th day of May, 1951, before Arnold Schubert, a Notary Public of the State of New York. * * * * * [784-65]

Direct Examination

Q. (By Mr. Williams): Mr. Catchings, you are a director of Warner Bros. Pictures, Inc.?

A. Yes.

Q. And have been for how long a period of time? A. Nearly 30 years. [784-66]

Q. I want to review very briefly your business experience. What is your profession?

A. Well, I am a member of the Bar, but I haven't practiced since 1909.

Q. Have you graduated from——

A. Harvard Law School.

Q. Harvard Law School? A. Yes.

Q. After leaving Harvard, did you engage in practice here in New York?

A. Yes. I was with Sullivan & Cromwell from 1904 until 1909.

Q. In 1909, into what business did you go?

A. Well, it really was—I was really out of the law before I left Sullivan & Cromwell. My purpose in going into Sullivan & Cromwell was to engage in business law, business activities, and in 1907 I

(Deposition of Waddill Catchings.)

was sent by the firm to assist the receivers of Milliken Brothers and made my office with them, and that was from 1907 on; and in 1909 I left Sullivan & Cromwell and became an employee of the receivers of Milliken Brothers, and after that receivership ended I was appointed receiver of the Central Foundry Company—that was about 1910, I should think—and when that company was reorganized I became president of it, and continued as president of it [784-67] for a period of about ten years.

I also was president, beginning at about 1912, of the Platt Iron Works Company, in Dayton, Ohio, and continued as president of that until the company was liquidated about ten years later.

In 1915 I became associated with E. R. Stettinius in the Export Department of J. P. Morgan & Company, which was the division of J. P. Morgan & Company that did the buying for France and England before the United States entered World War I. I continued there until April, 1917, just before we entered the war, and in 1917 I became president of the Sloss-Sheffield Steel & Iron Company, of Birmingham, Alabama, and then in 1918, the first of January, 1918, I became a partner in Goldman, Sachs & Company, the banking firm, and I continued as a partner in Goldman, Sachs & Company until 1930.

Q. In addition to the corporations you have mentioned, you have also been a director and officer or otherwise connected with a great many other corporations, have you not?

(Deposition of Waddill Catchings.)

A. Yes, sir. It was the practice of Goldman, Sachs & Company, to have a partner on the Boards of Directors of companies for which they issued securities, and I was the senior partner in Goldman, Sachs & Company most of the time and I was on a great many Boards of Directors, such [784-68] as Sears, Roebuck, Underwood Typewriter Company, Cluett, Peabody Company, and at least 15 or 20 others.

Q. Among others, you have been and are now a director of Chrysler Corporation, are you not?

A. I have been a director of the Chrysler Corporation since 1929.

Q. How did you come to become a director of Warner Brothers?

A. Well, Goldman, Sachs & Company issued stock for Warner Brothers, and I went on the Board, as was the practice, to represent the public stockholders on the Board of Warner Brothers at the time the stock was issued.

Q. You went on the Board about 30 years ago?

A. Yes. I think it was about 1924, not quite 30 years ago.

Q. And you have been on the Board ever since?

A. I have, yes.

Q. You have no employment by Warner Brothers or any connection with Warner Brothers other than as a member of the Board of Directors, have you?

A. No, that is correct. I haven't had for a great many years.

(Deposition of Waddill Catchings.)

Q. In addition to that, you also have other interests outside of Warner Brothers which take up your time?

A. Oh, well, I am actively in business in the [784-69] production of radio programs at the present time.

Q. The only connection you have is, in getting money from Warner Brothers, that you get a director's fee occasionally?

A. I do, yes, it has been rather occasionally in the past; recently it has been more frequent, but for many years it hasn't been much. Directors do not receive salaries from Warner Brothers. They get a fee of \$50 for attending a Board meeting.

Q. Now, Mr. Catchings, I direct your attention—incidentally, so that there may be no misunderstanding about this, I had a talk with Mr. Catchings a day or so ago and went over these various meetings with him so as to refresh his recollection as to the meetings.

I call your attention now to a meeting of the Board of Directors of Warner Bros. Pictures, Inc., which was held on the 25th of September, 1945, and in order to refresh your recollection as to the particular meeting concerning which I am going to question you, I want to say that at that meeting the resignation of Joe Bernhard as Vice-President and Director of Warner Brothers was tendered to the directors. That sufficiently identifies the meeting for you, does it? A. Yes.

Q. Do you remember at that time whether in

(Deposition of Waddill Catchings.)

connection [784-70] with the presentation of Mr. Bernhard's resignation, any statement was made concerning the reasons for his resignation?

A. Yes. He was resigning to go into the production of motion pictures. A corporation was being formed jointly by him and Milton Sperling. I think it was called the United States Pictures Corporation.

Q. At that time the directors did, as the record shows, accept his resignation? A. Yes.

Q. Was there anything said at that time as to who Milton Sperling was? A. Yes.

Q. What was stated in that regard?

A. He was stated to be a son-in-law of Harry Warner's, but that was well known anyhow, and it was stated that he was going into the business with Joe Bernhard and that the two were to engage in business together and they were going to make some contract with Warner Brothers under which they would have the use of Warner Brothers' facilities on the same terms, or generally speaking the same terms, as prevailed with respect to other independent producers that worked on the Warner lot.

Q. In connection with your vote on this measure, I take it from the minutes that you voted to accept the [784-71] resignation? A. Yes.

Q. Did anybody at that time, or in connection with it, state to you how you should vote?

A. No.

(Deposition of Waddill Catchings.)

Q. When you did vote, did you do so in the exercise of your own independent judgment?

A. I did.

Q. I call your attention to a next meeting of the Board of Directors, which was held just three days later on the 28th of September, 1945, at which the record shows that you were present and at which time, in order that you may identify the meeting, a proposed contract between Warner Bros. Pictures, Inc., and United States Pictures, Inc. was presented to the Board for consideration. I ask you whether you have any recollection of what transpired at that meeting.

A. Well, there was a brief outline of the terms of the contract and there was quite a little discussion with respect to the contract, what it covered and the commitments that the company was making, the commitments that were being made to the company.

Q. Do you remember any of the details of that contract?

A. No. It wouldn't be possible for me to remember [784-72] back that far the details of a contract.

Q. Do you have any recollection as to whether Warner Brothers were to put up any of the financing for that deal? A. No, I do not.

Q. Do you remember what the division of profit was to be in connection with the matter?

A. No.

Q. Now, at the time was the matter——

A. I knew it at the time.

(Deposition of Waddill Catchings.)

Q. Yes, I appreciate that. At the time was there a considerable discussion about the terms of the contract? A. Yes, there was.

Q. Do you remember whether Mr. Friedman was present at that time?

A. Yes, he was, and I think he presented quite a summary of the terms of the contract.

Q. At the time you voted on that contract—I take it you did vote in favor of authorizing the entering into the contract? A. I did.

Q. Did any person say to you in what way you should vote on that matter? A. No.

Q. When you voted, did you exercise your own independent judgment as to the manner in which you should vote? [784-73] A. I did.

Q. Did you consider that contract to be a good contract from the business viewpoint for Warner Brothers? A. I did.

Q. Incidentally, was there anything said either at that meeting or at the preceding meeting on the subject of Milton Sperling, as to whether he had had any experience in the production of motion pictures?

A. Yes, I think he was—I think that so far as I am concerned, I think I knew it before that, but I think it was covered in the meeting that he had met with considerable success in work for other moving picture companies and was a very promising young person in the moving picture business.

Q. And you had that information when you voted on this contract? A. Yes.

(Deposition of Waddill Catchings.)

Q. I now call your attention to a meeting which was held—incidentally, I almost overlooked something. You were out on the Pacific Coast and in and about Los Angeles immediately prior to this meeting of the 25th of September, were you not, or shortly prior to that?

A. Well, I had been out there on so many occasions that I don't know—I would have to look up some records to tell whether I was out there just prior to this. But I have been going to Hollywood in connection with Warner activities repeatedly over a long period of time.

Q. Let me ask you this: Do you remember having had one or more conversations at or about this time with Mr. Harry M. Warner in Hollywood and perhaps here in New York in which there was some discussion about this proposed contract or this contract with United States Pictures and Sperling and Bernhard?

A. I think that the discussions at that time with Harry Warner occurred in New York with respect to Sperling and Bernhard. He was here some time before that meeting, and whether he talked to me at that time or not, I don't know. But he was here shortly after the meeting and he went over the thing at considerable length, covering much the same ground that had been covered in the statements that were presented to the Board.

Q. Do you have any recollection of anything that he stated as to the reasons why he believed that the making of such a contract by Warner Bros.

(Deposition of Waddill Catchings.)

Pictures, Inc., with United States Pictures, Inc., would be a good thing for Warner Brothers?

A. Yes. He had great confidence in the ability of Joe Bernhard, as we all did. I had known Joe extremely well for a period of years and had a very high regard for him, and high expectations were held as to the success that would [784-75] come from the exercise of his abilities in the production of pictures; and also the fact that working under a man such as Joe, a man with such ability as Joe, that Milton Sperling would develop very rapidly in accordance with the promise that he gave from the work that he had already done.

It was thought that training under Joe would be very, very beneficial to Milton and his growth and development.

Q. Was there anything said as to what interest Warner Brothers might have in the growth and development of Milton Sperling?

A. It is very hard, Mr. Williams, for me to say how much I knew at that time and how much I knew later than that time, because you can't divide your memory up into sections like that. As far as I know, from the time that these arrangements were made with Milton, I had high hopes that Milton would grow to be a very important person on the Warner lot who would have real possibilities of high executive position in the course of time.

Q. Was anything said to you by H. M. Warner or any of the other officers of Warner Brothers at that time about the desirability of having somebody

(Deposition of Waddill Catchings.)

on the Warner lot with such experience that he would be able to take over in case anything happened to Jack Warner?

A. Oh, yes, that was certainly the subject of discussion. [784-76] I think I ought to say here that it has always been a deep conviction of mine that a man could not develop for headship in a company under someone else, that—I mean, to succeed them, that he had to have responsibility of his own, and I thought that the conditions that we created with respect to Milton would give him a chance to *drown* if he had in him the qualities that he appeared to have, and grow in a way that would be much better than if he were acting as an assistant or a subordinate of Jack Warner.

* * * * * [784-77]

Q. (By Mr. Williams): The next meeting was the 23rd of November, 1945, and on that date a meeting was held in reference to an amendment, or amendatory letter, having to do with the clarification of the fact that in case United States Pictures borrowed money from any bank or banks, that that money was to be paid back to the banks by Warners before they got any money out of it themselves?

A. Yes.

Q. You remember the circumstances of that meeting?

A. Well, I have seen those minutes recently and that refreshes my recollection. I don't remember it apart from that.

Q. At any rate, you do remember that the mat-

(Deposition of Waddill Catchings.)

ter had to do with a small amendment in connection with the bank loan?

A. Yes, I remember that very well.

Q. And at the time you voted in favor of the subject? A. Yes.

Q. At that time, or in connection therewith, did any person say to you in what manner you should vote on that? A. No.

Q. And when you did vote, you used your own independent judgment in the matter?

A. Yes. [784-78]

Q. I call your attention next to a meeting that was held on the 18th of June, 1946, at which it appears that you were present and at which there was presented to the directors a matter of a change of the terms of the basic United States Pictures Company agreement with reference to a picture called Pursued, and the organization of a corporation called Hemisphere Films, which was the corporation in which Niven Busch, the author of the picture Pursued and Teresa Wright, the star that was proposed to be used in the picture, should be stockholders. Do you remember the circumstances of that matter being brought before the Board?

A. Well, I have examined those minutes and, with the aid of the minutes, I recall that it took place; but I couldn't have done it without seeing the minutes.

Q. Well, do you remember now, having refreshed your recollection, that at that meeting the matter was discussed and that it involved Warner Brothers

(Deposition of Waddill Catchings.)

taking a smaller proportion of the profits, but on the other hand getting a larger proportion of the distribution costs and overhead? A. Yes.

Q. Do you remember whether at that time there was presented to the Board an analysis of some figures based on assumed grosses that Mr. Carlisle had presented, discussing what the probable profits to the corporation *would* [784-79]

A. Well, that was common practice, but remembering whether the thing was done specifically, I mean, I can't imagine it was omitted, but I can't go back after all this time and say that I would specifically recall that particular thing having been presented.

Q. Well, the record shows that this was adopted unanimously, and I take it that you voted for the change? A. I did.

Q. In doing so, you used your own judgment and were not dictated to by anybody else?

A. That is correct.

Q. I now call your attention to a fact which has come to light in connection with a contract which has been referred to here as the letter agreement of December 6, 1947, and which was identified on May 3, 1949, in connection with the discovery proceedings as Plaintiff's Exhibit 6. This an agreement which provides for the production of four additional pictures. The original contract, as you will remember, provided for the production of six pictures, and it involved a distribution of the profits, 50 per cent to Warner Brothers and 50 per

(Deposition of Waddill Catchings.)

cent to United States Pictures; it also provided that Warner Brothers would share half of the cost of producing the pictures and that the domestic distribution fee should be 20 per cent.

Now, this letter of December 6, 1947, was not at [784-80] that time presented to the Board of Directors but was executed on behalf of Warner Bros. Pictures, Inc., by R. J. Obringer, Assistant Secretary. It provides in substance that Warner Brothers shall put up the entire cost of four additional pictures, without reference to the first group of pictures; that the overhead to be charged to United States Pictures will be enlarged and increased; that the domestic distribution charge will be increased from 25 to 25 per cent, with some additional increases for foreign distribution; and that upon the distribution of the picture, the profits, after paying off all costs and distribution charges, will be divided 80 per cent to Warner Brothers and 20 per cent to United States Pictures.

Now, with that in mind, I call your attention to the fact that on the 17th of August, 1950, there was held a special meeting of the Board of Directors of Warner Brothers at which a third amendment providing for three additional pictures on top of these four additional pictures was presented to the Board, the conditions of production of the three additional pictures being substantially the same as those of the four additional pictures. Do you remember that matter being brought before the Board on or about the 17th of August, 1950?

(Deposition of Waddill Catchings.)

A. Well, with the same qualification that I made before, that the fact that it is recorded in the minutes [784-81] I used that to refresh my recollection. I do not have to have my recollection refreshed with respect to the two transactions, because I have a recollection that I was in Hollywood at some time prior to this meeting in 1950, and possibly in 1947, and that I knew at the time what was being done with respect to enlarging or adding to the activities of Milton Sperling there on the Warner lot. I have a very vivid recollection of having been present in Harry Warner's office at a meeting between Harry and Milton Sperling with respect to modifications in the contract, as I was in Hollywood at the time, and Harry told me he was going to have a talk with Sperling and invited me to come and sit in his office while the discussion took place. That I remember very vividly, because I had never had a chance of seeing Milton Sperling in action, so to speak, and the manner in which he conducted the discussion with Harry, his thorough fairness, made a very lasting impression on me. It was the first time I came to know much of the man, of the ability that he undoubtedly has. Before that I had to take it more or less on hearsay.

Q. That was prior to this meeting of August 17, at which the matter came up before the board?

A. You are talking about August 17, 1950?

Q. Yes. [784-82]

A. Oh, yes, it was some time prior to that, and while I am not certain as to just when it occurred

(Deposition of Waddill Catchings.)

in Hollywood, I should say that it occurred somewhere around 1947.

Q. I will show you now these minutes of August 17, 1950, and it is only necessary for you to refer to the last page, Mr. Catchings, because that is the only part that deals with this subject, and ask you to examine those minutes and refresh your recollection from that examination. Then I will ask you some questions.

(The witness examined the minutes referred to.)

Q. You have now examined the minutes. I will ask you whether you now remember that the matter of the approval by the directors of the change that had been made in the contract was brought before the board and passed on. A. Yes.

Q. And you voted in favor of it?

A. Yes.

Q. And at the time you voted in favor of it, did you do so of your own independent volition, without any suggestions or statements from other persons? A. Yes.

Q. And this vote by you was after you had known of the pendency of these changes through having participated, at least as a spectator, in the conferences between [784-83] Milton Sperling and Harry Warner?

A. I participated more than as a spectator. I was there as a director of the company, but I didn't engage in the discussions.

(Deposition of Waddill Catchings.)

Q. And you did personally approve of the changes in the contract?

A. Oh, very definitely.

Q. Let me ask you this, Mr. Catchings: I preface it by saying, of course, this company is Warner Bros. Pictures, Inc., and Harry Warner is president, Major Albert Warner, Vice-President, J. L. Warner is Vice-President, all of them are directors, and Harry Warner is the executive head of the company, and Major Albert Warner is the Treasurer, and Jack Warner is the head of production; naturally, you think of the Warner Company.

Let me ask you this: You have been a member of the Board of Directors of this company for almost thirty years. At any time have any of the Warner brothers undertaken to direct you as to how you should vote in reference to any matter that came before you as a director of this corporation?

A. Certainly not.

Q. In its inception you came on to this board as a representative of the public stockholders?

A. That's correct. [784-84]

Q. And you have had, I think you stated, a very large experience as a director of many publicly held corporations?

A. That is true. * * * * *

Q. Will you state as to whether, in voting upon any of these matters as to which you voted, Milton Sperling's being a son-in-law of Harry Warner was given consideration by you in connection with the contracts?

A. Well, I knew that he was a son-in-law of

(Deposition of Waddill Catchings.)

Harry Warner, so I couldn't fail to give consideration to the fact; but it certainly did not influence my voting in favor of any of the contracts.

I would like to put the answer in the negative, and that is that I can conceive of no reason why I should vote against Milton Sperling because he was a son-in-law of Harry Warner. [784-85]

Q. Well, state just as frankly as you can what your attitude toward the situation was in view of the fact that Milton Sperling was a son-in-law of Harry Warner's.

A. Well, Milton Sperling, as I have said repeatedly in my testimony here, was a very able young man and there was certainly no reason, because he was related to Harry Warner, in my opinion for voting against him. As a matter of fact, the close relationship which existed between him and Harry Warner was much in his favor, as far as I was concerned, because Warner Brothers was conceived and always has been and is today, a family company. It is run by the three Warner brothers, the executive end of the business, and its great strength and its magnificent growth has been a result of the splendid and harmonious relationship which has existed between the brothers as members of the family, and I think Warner Brothers is somewhat unique in that respect, that it is a great public corporation and yet it is a family company.

Q. What did you have in mind in connection with Milton Sperling's relation to Harry Warner being an advantage to the corporation?

(Deposition of Waddill Catchings.)

A. I mean by that that Milton saw a great deal of Harry, and Harry had a great deal of confidence in him, and Harry's team, in running the company, was a team at the top composed of members of the Warner family and if you [784-86] could have a man of great ability added to the team, who was also a member of the Warner family, even as a son-in-law, it seemed to me to be a strong point in his favor.

Mr. Williams: I have no further questions.

Cross Examination

* * * * * [784-87]

Q. (By Mr. Pottish): You do not have any large stockholdings in Warner Bros. Pictures?

A. No, I haven't personally.

Q. Is it a fact that from year to year, when the Board of Directors of Warner Brothers is put forth, the slate is put forth by a Nominating Committee?

A. I don't know that there has been a formal Nominating Committee.

Q. Well, are you familiar with the mechanics whereby each year, at the annual meeting of stockholders, a slate of directors is presented to the public stockholders for voting?

A. I certainly am familiar with that, but that is [784-90] by action of the Board of Directors itself. It selects the nominees to be submitted in behalf of the company to the stockholders.

Q. The existing Board of Directors selects the

(Deposition of Waddill Catchings.)

slate which will be presented at the next meeting of the stockholders?

A. Yes. Well, but it is presented to the Board prior to the meeting.

Q. Yes. Isn't there some Executive Committee which has some control as to who shall be named in that slate?

A. I don't know of any.

Q. Is it a fact that the three Warner brothers, or the Warner brothers' family controls the slate of directors which is annually presented to the stockholders?

A. I wouldn't say that. I should say that it is the action of the Board of Directors. There have been changes made in the Board of Directors from time to time, and they have been discussed among the directors. I have never felt that the Warner brothers were dictating to me as a member of the Board as to what names to submit to the stockholders. Each year there comes a time when we appoint a proxy committee, and when we authorize the calling or the solicitation of proxies and the submission to stockholders of a list of candidates, and that is a matter of discussion in the Board, and the Warner brothers [784-91] express their opinion, and anybody else that has any opinion is entitled to express it, and I can say to you positively that I think if there was any objection to anybody, that they wouldn't be submitted.

The Warner Brothers' Board has not been a Board of divided action; it has been one of the fine

(Deposition of Waddill Catchings.)

qualities of Harry Warner and his leadership of the company to devise his policies in accordance with the advice that is given to him and his knowledge of the attitude of the Board of Directors. I think he has shown as much deference to the outside men that are on the Board of Directors as any corporate head I have ever known.

Q. But am I correct in saying that it is considered that the leadership of the company lies with the Warner brothers and their family?

A. Well, I covered that quite fully a while ago, I say that so far as the corporation leadership is concerned, the corporate leadership is of the officers of the company, which is precisely the same as every other corporation I have ever been on.

Harry Warner speaks not as a member of the Warner family but as the President of the company, when he is addressing a recommendation to the meeting.

Q. Well, you know, do you not, that the Warner brothers control a large block of stock in the company? [784-92]

A. Yes, that is public knowledge, I think.

Q. And would it be an unfair statement to say that if the Warner brothers desired to keep somebody off the slate, that there would be no question about the fact that such person would be kept off the next slate of the Board of Directors?

A. I wouldn't say that was so. I think that it is purely a matter of speculation as to what would happen if there was a difference of opinion between

(Deposition of Waddill Catchings.)

the Warner brothers and those of us who are not connected with the company or members of the family. That situation has never arisen. But I have never seen any indication of a desire by Harry Warner to force upon the Board of Directors any nominees that were not agreeable to the Board.

Q. Would you feel as though you would be willing to act on the Board of Directors against the opposition of the three brothers?

A. You mean would I be willing to oppose them in the Board?

Q. No, no, that is not what I said. I said: Would you feel that you would want to act as a director if you were advised by the three Warner brothers, prior to a coming election that they preferred that you no longer act as a director?

A. Well, I don't know. That is a speculative [784-93] question. There might very well be circumstances where I would want to get off. But on the other hand, the circumstances might be such that I would want to put up quite a fight. I have had this rather long experience in business and on Boards of Directors, as I have testified here, and that situation has never arisen in any company, and just what I would do under those circumstances, I can't tell. I used to think, when I was on the Board of Directors of Goldman, Sachs & Company, that I didn't need anybody else on the Board except me, that I didn't care how many other people there were, if I were right I could persuade the Board of Directors to act the way I thought they should,

(Deposition of Waddill Catchings.)

and I always did, and I didn't want any lieutenants or anybody there. I have always found the executive heads of companies responsive to reasonable argument.

So when you ask me what would happen if I were opposed to something the Warners said, it is just inconceivable to me that that situation would develop.

Q. Well, my point is this: Do you feel that you could be elected to the Board of Warner Brothers over the opposition of the three brothers?

A. I think that might very well be true, if they were to take a high-handed arbitrary attitude; but I don't know whether now, as I say, in the twilight of my life, I would have sufficient influence to do it, but [784-94] certainly there have been plenty of times in the past, and if the Warners had wanted to push me around I could have formed a group that might well have pushed them around. They have never had an open and shut control; they had only started with a certain amount of stock, and there have been plenty of stockholders on the outside. * * * * * [784-95]

Q. How many members of the public—and when I say that, I mean directors similar to yourself, whose origin as directors started from representing public stockholdings—how many such public members of the Board of Directors are there on Warner Brothers' Board?

A. Well, I don't think there is any one on Warner Brothers except myself who started as a rep-

(Deposition of Waddill Catchings.)

representative of the public. Goldman, Sachs & Company were the original bankers. Later on, Hayden Stone had something to do with Warner activities, and Dick Hoyt came on the Board as a representative of the public, but he got off in the course of time, and, so far as I know, I am the only one that ever started as a representative of the public. That does not mean that I am the only independent director on the Board. Jack Bierwirth is a man of very real and far-reaching independence in business. Charlie Guggenheimer is a well-known and successful lawyer, and Morris Wolfe is a most [784-96] character and entirely independent; I don't think anybody can control Morris Wolfe. He is a very distinguished lawyer in Philadelphia, as you know. * * * * *

Q. You testified that it was stated at that meeting that Milton Sperling was his son-in-law and that he was going with Joe Bernhard. Now, who made these presentations [784-97] or these statements?

A. Well, I think I testified a while ago that Mr. Stanleigh Friedman made a long analysis of the contract and presentation, and I think that he conducted the main part of the discussion; but statements were made—I haven't verified it from the minutes, but I imagine that Albert Warner was there and talked on the subject, and certainly later on Harry Warner was at some of the meetings and he talked plenty on the subject.

Q. If I may get back to the meeting preceding

(Deposition of Waddill Catchings.)

the meeting at which the contract was approved, and that is the meeting at which Bernhard's resignation was presented, you told us that it was stated that Milton Sperling, the son-in-law of Harry Warner, was going in with Joe Bernhard and that they were going to make a contract with Warner Brothers—and I am just giving the substance of what I think you said—on the same terms as prevailed with other independent producers that work on the Warner Brothers lot.

A. I think that is right.

Q. Now, did you have, or do you have now, any detailed knowledge of what the terms of the contracts are with other independent producers on the Warners Brothers lot?

A. No, but I have at time read them from beginning to end and have been thoroughly familiar with them. [784-98]

* * * * *

Q. Did Stanleigh Friedman at that time, do you recall, brief the Board on whether or not that contract was similar to other contracts with other independent producers and give the details of those similarities? [784-99]

A. I think he did so by reference. I think he mentioned at the time that it is a contract similar to such-and-such that we made with other people, then mentioning their names.

Q. At the time he said that, did you then have an independent knowledge as to whether or not the terms were identical or similar between this U. S.

(Deposition of Waddill Catchings.)

Pictures contract and other independent producers?

A. No, I said a few minutes ago, I didn't read the contract before action at the Board. I acted on the statement that was made by Stanleigh Friedman.

Q. And you relied on his statement, did you not, that the contract was similar to contracts made with other independent producers on the Warner lot?

A. Yes.

* * * * *

Q. Would you remember whether or not, at that meeting, Major Warner recommended that the contract be approved? [784-100]

A. Oh, undoubtedly. He was present at the meeting, I assume.

Mr. Williams: Yes, he presided.

The Witness: He undoubtedly recommended it.

Q. Did that carry weight with you in your own mental deliberations as to whether the contract should be approved?

A. Well, he was transmitting a recommendation from the Coast, as we call it, with respect to this contract, and I don't think that anything that Major Warner said added anything. He was presenting the recommendations of his two brothers, H. M. and J. L., and they were the ones who were primarily concerned with the contract.

Q. Did that recommendation mean something to you? A. It did.

Q. Would you say that you placed a lot of faith in the recommendations from the Coast?

(Deposition of Waddill Catchings.)

A. Oh, yes. I don't know how to run the company from New York without placing faith in the recommendations from the Coast.

Q. Was that pretty much, do you think, the belief and actions of the other members of the Board, too?

A. Well, I can't testify about the other members of the Board. [784-101]

* * * * *

Q. You testified too, Mr. Catchings, that you had some conversations, or at least one conversation, with H. M. Warner in New York concerning Sperling and Bernhard, but as I recall, you testified you did not recall whether that conversation was before or after the meeting of September 28, 1945.

A. I think that I said that it occurred after that time.

Q. After the meeting? A. Yes.

Q. And at that time you got the impression from H. M. Warner that he thought it was a good contract? A. Yes.

Q. And he spoke highly of Mr. Bernhard and the help he would be in making a success of that venture for you at pictures?

A. Yes. He was particularly emphatic upon the benefit to Milton as a young man in growing up under the very real wisdom of Joe Bernhard. Joe Bernhard had not spent his life in the moving picture business, as you know; he had come into Warner Brothers from real estate activities, as far as

(Deposition of Waddill Catchings.)

I recollect, and had been extraordinarily successful in his executive work here in the handling of the theatres and was a man of ripe experience and wisdom, and the emphasis was on the benefit to Milton, who was growing up in the motion picture business, of association with Joe, not because of what Joe knew about the making of pictures, but what Joe knew about the world, and life, and his general executive ability. [784-103]

* * * * *

Q. Well, at any time prior to the approval at any of these meetings of these subsequent amendments to the basic agreement, had you made any independent investigation [784-105] as to how the contract was working out?

A. Well, I don't make any independent investigation. I had information from Carlisle from time to time as to how the pictures were turning out. I have been pretty well informed as to what pictures were successful and how much money we were making on them, and things of that sort.

Q. Did you at any time prior to these amendments investigate or exercise any surveillance over the administration of the contract with regard to the amount of overhead that was being charged by United States Pictures?

A. Oh, no.

Q. As its share?

A. Oh, no. That is entirely outside of my function as a director. * * * * * [784-106]

DEPOSITION OF C. S. GUGGENHEIMER

Plaintiff's Exhibit 117. Deposition of Charles S. Guggenheimer, a witness called by and in behalf of the defendants, taken pursuant to Stipulation dated May 2, 1951, at 321 West 44th Street, New York, N. Y., on the 17th day of May, 1951, before Arnold Schubert, a Notary Public of the State of New York. [784-109]

* * * * *

Direct Examination

Q. (By Mr. Williams): Mr. Guggenheimer, what is your occupation or profession?

A. Lawyer.

Q. How long have you been practicing law?

A. I was admitted in 1899.

Q. And you have been practicing all that time in New York City, have you, Mr. Guggenheimer?

A. Yes, sir.

Q. You are a member of what firm?

A. Guggenheimer & Untermeyer, in New York, and Guggenheimer, Untermeyer, Goodrich & Amram, in Washington, D. C.

Q. Your work has involved your being attorney for and director of and officer of many corporations, I take it?

A. That is correct. [784-110]

Q. And has covered that entire period from 1899 up to the present time, with, I can assume, a little less activity in the earlier years?

A. A little less activity so far as being a director, and so forth, is concerned; very much less.

(Deposition of Charles S. Guggenheimer.)

Q. But during the major portion of your career as a lawyer, you have had close connections as director and officer and attorney for many corporations? A. Yes, sir.

Q. And you are now a director of Warner Bros. Pictures? A. I am.

Q. And have been for how many years?

A. The early '30's; I don't remember exactly whether it is '31, '32; it was the early '30's.

Q. Your firm has now and from time to time has had some connection with Warner Bros. as attorneys for them in certain matters?

A. We have.

Q. You have been from time to time and now are under retainer from Warner Bros.?

A. We are on a retainer from them today.

Q. Warner Bros. are not your principal client by any means, I take it?

A. No. [784-111]

Q. And your professional connection with Warner Bros. is not by any means your means of making a livelihood? A. It is not.

Q. Do you have any office or employment with Warner Bros. other than director, except for the retainer it pays your firm? A. None.

Q. You never have had? A. Never.

Q. Have you made it a practice of attending practically all of the meetings of the Board of Directors of Warner Bros. Pictures, Inc.?

A. I would say yes.

Q. Now, I call your attention specifically——

(Deposition of Charles S. Guggenheimer.)

Mr. Williams: And I may say for your benefit, Mr. Pottish, that within the last few days I have gone over these minutes with Mr. Guggenheimer with the idea of bringing his mind to the subject under discussion and refreshing his recollection so far as it may be refreshed from examining the minutes, and I will therefore ask leading questions about some of these meetings.

Q. Do you have in mind the meeting of the 24th day of September, 1945, of the Board of Directors, which I can further identify for you by saying it was the meeting at which the resignation of Joe Bernhard was acted upon by the [784-112] Board?

A. I have a distinct recollection of that meeting.

Q. You were present at that meeting?

A. I was.

Q. And voted on the resolution involving Mr. Bernhard?

A. Right.

Q. Do you remember whether at that meeting, in connection with that matter, there was any statement made by any person with reference to the reason why Mr. Bernhard was resigning from Warner Bros.?

A. It is my recollection that Mr. Bernhard—I asked Mr. Bernhard personally, and he told me he had three sons—I think three—and that he wanted to look to their future, and he thought that he would be a producer and that this sons would have a business that they could inherit.

(Deposition of Charles S. Guggenheimer.)

Q. Do you remember anything being said with reference to his entering into a business with Milton Sperling, the son-in-law of Harry M. Warner?

A. Yes. Whether, frankly, it was that meeting or before or after, I don't know, but I distinctly recall hearing that; the United States Pictures, I think, was the name.

Q. At that meeting the resignation of Mr. Bernhard as an officer and director of Warner Bros. was accepted?

A. It was. [784-113]

Q. You voted favorably to accepting that resolution?

A. I did.

Q. In connection with your vote, did any person state to you how you should vote or indicate a desire that you should vote one way or another on that motion?

A. No.

Q. In casting your vote, did you use your own independent judgment as to the matter?

A. Very definitely.

Q. I now call your attention to a meeting which was held three days later by the directors of Warner Bros., and when I say Warner Bros. I always mean Warner Bros. Pictures, Inc., at which you were present and at which there was presented a contract proposed to be executed between Warner Bros. and United States Pictures, Inc. Do you remember the occasion of that contract being presented to the Board?

A. I remember a meeting at which a contract was submitted, yes.

Q. Do you remember whether at that time there

(Deposition of Charles S. Guggenheimer.)

was anything said on the subject of the connection, if any, of Joseph Bernhard and Milton Sperling with United States Pictures, Inc.?

A. Yes, I think there was.

Q. What do you remember that was said on that subject? [784-114] What, if anything, in connection with it?

A. That they were United States Pictures.

Q. Do you remember whether the contract was explained by any person there? Were the terms of the contract stated by any person there?

A. Yes, I think they were. It is my impression it was Mr. Friedman who discussed it, stated the terms of it, and so forth.

Q. Do you have any recollection now as to what the terms in general were?

A. Very general. They were to make a certain number of pictures; the company was to—as I say, I am speaking completely from recollection; that is how long—six years ago, isn't it?

Mr. Pottish: That's right.

A. (Continuing): The company was to advance a certain part of the cost of the picture; they were going to make some bank loans or something, and the loaners were to get their money back before profits were taken, and then profits were to be divided in some way. Now, that is my recollection of the thing in general.

Q. Do you know whether at the time Mr. Friedman did explain the terms of the contract in detail?

A. I think he did, very definitely in detail.

(Deposition of Charles S. Guggenheimer.)

Q. After the matter had been discussed, it was voted [784-115] on. Did you vote favorably to authorizing the execution of the contract?

A. I did.

Q. At that time did you do so in the exercise of your own independent judgment on the matter?

A. I did.

Q. Did anybody state, directly or indirectly, to you, that you should vote in any particular way in the matter? A. No.

Q. I call your attention to the fact that on the 23rd of November, of the same year, 1945, there was a directors' meeting held at which Mr. H. M. Warner was present, among others; at which there was presented a short letter agreement which constituted an amendment of the United States Pictures-Warner Bros. contract having to do with the one subject that the amount of any loans from banks should be deducted from the moneys payable to United States Pictures and turned over to the bank by Warner Bros. Do you remember the circumstances of that matter coming before the Board?

A. I will say yes. I remember several amendments of it. Dates I do not remember. There was this, and then I think there was even a subsequent amendment.

Q. That is correct. Now, as to this particular matter, the record of the meeting shows that it was resolved. [784-116] Did you vote in favor of that resolution? A. I did.

(Deposition of Charles S. Guggenheimer.)

Q. And in doing so, did you exercise your own independent judgment? A. I did.

Q. Was there any statement made to you by any other person that you should vote in any particular way on that matter? A. No.

Q. Now I direct your attention to a meeting of the directors of Warners Bros. which was held on the 18th of June, 1946, the following year, at which there were present Mr. H. M. Warner and Jack Warner and Albert Warner and the other directors, including yourself—no, they were not all present; Albert Warner was present but not Harry or Jack.

Mr. Pottish: Excuse me, what was the date there, please?

Mr. Williams: This is the 18th of June, 1946.

Q. (Continuing) This is a meeting concerning a motion picture, the name of which was Pursued, and the proposal was that there should be an amendment to the basic United States Pictures-Warner contract with relation to that picture only. There was a writer named Niven Busch and an actress, a star, a motion picture star named [784-117] Teresa Wright, who was organizing a corporation known as Hemisphere Pictures, and they proposed to make a deal with United States Pictures which United States Pictures in turn would treat as a contract with Warners under the basic distribution and production agreement. Under the terms of this amendment, referring to this individual picture, Warners would receive only one-third of the net profit; on the other hand, the dis-

(Deposition of Charles S. Guggenheimer.)

tribution charge would be raised from the 20 per cent provided in the basic agreement to 25 per cent, and the amount of overhead would be increased.

Do you remember the discussion of that particular contract?

A. I remember the name of the picture Pursued. I do not remember the actual discussion in connection with it.

Q. Do you remember that at the time the matter was voted on there was some discussion and explanation of the matter to the Board?

A. Yes.

Q. And you voted, did you, in favor of that amendment? A. I did.

Q. In so doing, did you exercise your own independent judgment in your vote?

A. I did.

Q. Were you at that time directed or requested by any person to vote in any particular manner on that issue? [784-118] A. No.

May I just interrupt for just a moment to say this: At no time since 1932, when I have been on the Board, has anybody asked me to do anything in the way of voting or not voting, and if you go through all the records you will find that I have on some occasions voted diametrically opposite to the Warners and to everybody else. On one occasion, as I recall it, I was the only one who voted against it. I mean, I am glad to answer that each time, but that goes. They just have never asked me to vote.

(Deposition of Charles S. Guggenheimer.)

As a matter of fact, Harry Warner came to me and congratulated me on my independence.

Q. Mr. Guggenheimer, without the necessity of repeating it, we can regard it as being your testimony——

A. I am perfectly satisfied that you should; I am just calling your attention to it.

Q. We can probably save time. We can take it, then, that with reference to any meetings involved in this United States Pictures deal, that no person did make any suggestions, requests or directions as to how you should vote on any of the matters?

A. Definitely not.

Q. Now, I direct your attention to a meeting of the directors of Warner Bros. which was held on the 17th of August, 1950, and I recite, in order to refresh your [784-119] recollection about the matter, that on or about the 6th of December, 1947, there had been executed an agreement, which has been identified in this record as being the Exhibit No. 6 attached to the discovery proceedings on the 3rd of May, 1949, and that is an agreement which provided for the making of four additional pictures by United States Pictures. The original contract provided for the making of six pictures on the basis of Warner Bros. putting up half the cost, United States Pictures putting up half the cost, which they might borrow in whole or in part from banks, provided that after the banks had been paid and Warner Bros. had been paid, and after a distribution fee of 20 per cent had been deducted,

(Deposition of Charles S. Guggenheimer.)

and other expenses and costs had been recovered, that the net profits of each picture were to be divided fifty-fifty between Warner Bros. and United States Pictures. It provided for six pictures.

Now, on the 6th of December, 1947, as I have said, an amendatory agreement was executed which provided for the making of four additional pictures, or they were called additional pictures. Those pictures were to be produced on different terms: Warner Bros. was to put up the entire cost of production; the distribution fee was to be raised from 20 per cent to 25 per cent domestic; the British distribution was to be raised from 25 to 30 per [784-120] cent, and all of the other foreign was to be at 30 per cent; provision was made that Warners were to receive 80 per cent of the net profit and United States Pictures were to receive 20 per cent of the net profits. In all other respects the contract was to be subject to the terms of the basic agreement.

Then in 1950, on July 21st, a second amendment was made providing for the making of three additional pictures and extending the terms within which the pictures might be made. The last three pictures were to be produced on the same terms as the four additional pictures. By means of the series of contracts, that made a complete contract under which United States Pictures were to produce six pictures under the basic agreement, seven additional pictures, making thirteen in all, some of which had already been produced.

(Deposition of Charles S. Guggenheimer.)

Now, at this meeting of the 17th of August, 1950, this matter was brought before the Board of Directors, and I direct your attention particularly to the last page of the minutes of the meeting of that date, because the last page is the only portion that refers to this specific transaction, and ask you to read that. [784-121]

* * * * *

A. Yes, sir.

Q. Now, Mr. Guggenheimer, having had your recollection refreshed by what I have said and by reading the portion of the minutes referred to, referring to this matter, do you remember that at this meeting the matter was brought up before the Board of Directors, the matter of these additional pictures?

A. There was that matter brought up. I notice from the minutes—I am relying on the date of the minutes—I would say it was at that time. Frankly, I have no independent recollection of the date.

Q. You do have an independent recollection of the substance of the matter having been brought up?

A. I do, very definitely.

Q. Was that matter discussed by the Board members at that time? A. Yes.

Q. Thereafter a vote was taken, which, according to the minutes, acted favorably upon the amendment? A. That is right.

Q. Did you vote favorably to that matter?

A. I did.

Q. Was it your independent vote at that time?

(Deposition of Charles S. Guggenheimer.)

A. Definitely. [784-123]

Q. Do you remember what, if any, discussion was had, what matters were brought to your attention at that meeting before you voted?

A. You mean particularly did we discuss this contract?

Q. Well, that is what I had in mind. Do you remember if there was discussion of the contract?

A. Oh, very definitely.

Q. Do you remember what the particular discussion was?

A. Well, it was on an extension of time, wasn't it, to finish the pictures and also to make some new ones, and there were still some pictures unproduced on the original contract.

Q. You, at any rate, having heard the discussion, were favorable to taking that action?

A. I was.

Mr. Williams: You may cross examine.

Cross Examination [784-124]

* * * * *

Q. (By Mr. Pottish): Do you recall whether or not at the time you voted to approve the original agreement back on September 28, 1945, whether you then had an independent knowledge of whether the terms of this contract between Warner Bros. and United States Pictures were similar to the terms of other contracts with other independent producers that were working on Warners' lot?

(Deposition of Charles S. Guggenheimer.)

A. I did not know that it was similar or not. It seemed a fair contract.

Q. You say it seemed fair, but it would not be in the sense that it seemed fair in comparison with other contracts you knew about, would it?

A. I knew of no other contract at that time.

Q. At this meeting of September 28, 1945, do you [784-125] recall that either Mr. Friedman or Major Warner, or both of them, after either one or both explained the contract, recommended the contract as a good one?

A. I have no such recollection.

Q. Was it customary for a recommendation on an important matter, before a meeting over which one of the Warners was presiding, for the Warners to make a recommendation to the Board?

A. I do not recall ever having heard a recommendation from Major Warner. He has explained things, discussed them, talked over things, but when it comes flatly to say, "I recommend so-and-so," he may have, but I just have no recollection of it. [784-126]

* * * * *

Q. Sticking, if we may, to this August 17, 1950, meeting, had you prior to that time made any investigation on your own as to the administration of the contract as it had existed theretofore and how it was working out?

A. They explained to us, I believe, how many pictures [784-129] had been produced under it.

Q. Well, if I may be more specific.

(Deposition of Charles S. Guggenheimer.)

A. Or how many were still due, or something.

Q. Had you, to be more specific, made any independent investigation on your own as to how the contract was being administered with regard to how much overhead charges was being allowed to United States Pictures and how much overhead charges was being allowed to Warner Bros. and whether or not the charges or allowances might or might not be fair? Did you make any such investigation?

A. No. [784-130]

* * * * *

Q. Well, might I ask you if you ever actually inquired into the nature of the overhead charges that were being charged by United States Pictures to the operations under this contract?

A. No. All I tried to find out was, were they making money or were they losing money, and I understood they were making money on it.

Q. Just from the general viewpoint?

A. Yes, that is all that interested me—was the company getting a good deal? That's all.

Q. Were you familiar at the time as to the method provided under the basic contract between United States Pictures and Warner Bros. for the recouping of any losses by Warner Bros. on any one picture?

A. No, I wasn't.

Q. Would you say, Mr. Guggenheimer, that you would be willing to continue as a director in Warner Bros. Pictures at a forthcoming election of directors if it were against the wishes of the three

(Deposition of Charles S. Guggenheimer.)

Warner brothers that you be on the slate of directors for that election?

A. I think that the Warner brothers, who very largely control, could nominate or possibly succeed in nominating [784-132] somebody in my place. Whether they could, if I ran independently, whether they could succeed or not, you can guess as well as I can. I wouldn't know.

Q. Would you say that—

A. I would say that I would not, if I had a fight with them—I will go further than that and say I did resign once after an argument, when I disagreed, and I was told that I was there for the purpose of disagreeing if I felt that way, and please not to resign. I mean Harry Warner himself told me that.

Q. Is it a fact, Mr. Guggenheimer, that if you felt the three Warners no longer wanted you on that Board of Directors just prior to the election of a Board, that you desist from trying to become elected a member?

A. Well, now, just a minute. You are supposing here for a minute that I originally went on because the Warners love me. I didn't know them when I first went on; I went on because I represented about \$9,000,000 of debentures at that time and some seventy-five or a hundred thousand shares of the old stock, which is 200,000 shares now, and I still represent at this minute some fifty or sixty thousand shares. So that is why I am on the Board.

Q. Well, I appreciate that there is good reason

(Deposition of Charles S. Guggenheimer.)

for your being on the Board, Mr. Guggenheimer, but I still would like an answer, if I can get it, to my question. [784-133]

A. Well, you are asking me a question, would I stay on if the Warners didn't want me there. I would probably say no, unless my clients who own the shares would insist on my staying there, in which event I might make a fight. Don't forget, I do not represent the Warners directly, indirectly, or in any possible way; I have never—or any one of them. [784-134]

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DEPOSITION OF MORRIS WOLF

Plaintiff's Exhibit No. 118: Deposition of Morris Wolf, a witness called by and in behalf of the defendants, taken pursuant to stipulation dated May 2, 1951, at 321 West 44th St., New York, N. Y., on the 2nd day of June, 1951, at 10 a.m., before Julian Wolf, a Notary Public of the State of New York. [784-135]

* * * * *

Direct Examination

Q. (By Mr. Karp): Mr. Wolf, you are an attorney practicing in the State of Pennsylvania?

A. Yes.

Q. And how long have you been practicing law in that State? A. 48 years.

Q. And you are a member of the law firm there?

A. Yes.

(Deposition of Morris Wolf.)

Q. And what is the name of the law firm?

A. Wolf, Bloch, Schoor & Solis-Cohen. The last is one name with a hyphen between it.

Q. Your law firm handles the legal matters of Warner Bros. Pictures, Inc., in Pennsylvania and New Jersey, does it? A. Yes.

Q. That's a small part of the legal business of your [784-136] firm, isn't it?

A. It is a comparatively small part, yes.

Q. You are a director of Warner Bros. Pictures, Inc.? A. Yes.

Q. How long have you been a director of Warner Bros. Pictures, Inc.?

A. Since Warner Bros. acquired the Stanley Company of America in about 1929.

Q. And you made it a habit to attend the meetings of the Board of Directors of that corporation regularly? A. Yes.

Q. Now, do you recall having been present at a meeting of the Board of Directors of Warner Bros. Pictures, Inc., on September 28, 1945? And in order to identify that meeting, I will tell you that at that time there was presented to the attention of the Board a proposed agreement between United States Pictures, Inc., and Warner Bros. Pictures, Inc. Does that enable you to refresh your memory?

A. Not as to the date. I remember being present at the Board meeting at which that contract was presented.

Q. Now, do you recall who it was that presented

(Deposition of Morris Wolf.)

that proposed agreement to the attention of the Board at that time?

A. My recollection is that Mr. Friedman did.

Q. Mr. Stanleigh P. Friedman? [784-137]

A. Yes.

Q. And do you recall that he explained the terms and conditions of the proposed agreement?

A. I do.

Q. And do you recall that that agreement was unanimously approved by the Board at that time?

A. I do.

Q. And you voted for it? A. I did.

Q. And were you told or instructed by anyone how to vote on that occasion? A. No.

Q. You voted voluntarily? A. I did.

Q. Now, do you recall that in November of the same year there was another meeting of the Board of Directors of Warner Bros. Pictures, Inc.? And in order to identify that meeting I might say that it was purely for the purpose of amending the agreement to the extent of enabling Warners to set aside certain percentage of the moneys which ordinarily would have been due and owing to the United States Pictures, Inc., under the basic agreement, for the purpose of paying off loans that had been incurred by the United States Pictures, Inc.

A. I have a very vague recollection of that, Mr. Karp. [784-138]

Q. But do you remember having been present at the time?

A. I would not have remembered it, except from

(Deposition of Morris Wolf.)

refreshing my memory from a copy of the minutes.

Q. Yes.

A. I regard that as very formal—a pure formality and not of great significance, if I may be permitted to express a view.

Q. Do you recall having voted for the amendment at that time?

A. Well, I would not have recalled it, except that you refreshed my memory by calling my attention to the fact.

Q. Now, were you told by anyone how to vote on that occasion? A. Oh, no, no.

Q. Now, did you know prior to September 28, 1945, that Mr. Joseph Bernhard had resigned as a director of Warner Bros. Pictures, Inc.?

A. I did.

Q. Now, on June 18, 1946, there was a meeting of the Board of Directors of Warner Bros. Pictures, Inc., at which you were present. And in order to refresh your memory I have shown you a copy of the minutes of that meeting. Do you recall that at that time there was presented to the Board the proposed agreement between United States Pictures, Inc., and Hemisphere Pictures, with respect to the production [784-139] of a motion picture entitled Pursued? A. I do.

Q. And at that time a proposed amendment of the basic agreement between United States Pictures and Warner Bros. Pictures?

A. With respect to that picture?

Q. With respect to that picture.

(Deposition of Morris Wolf.)

A. Yes, I do.

Q. Do you recall having voted for the amendment? A. I do.

Q. And that it was unanimously carried by the Board? A. Yes.

Q. And again let me ask you, as I have previously asked you, whether the vote by yourself was voluntary. A. It was.

Q. And was it suggested by anyone?

A. No.

Q. Were there any instructions by anyone advising you how to vote at that time?

A. No.

Q. Now, do you recall that on December 6, 1947, an agreement was entered into between United States Pictures, Inc. and Warner Bros. Pictures, Inc., amending the basic agreement, extending the basic agreement, to 1951, and adding four pictures which were to be produced under that [784-140] agreement, also changing the agreement in the following manner: Warners was to advance 100 per cent of the costs. The profits, however, to be realized by Warners was to be 80 per cent instead of 50 per cent? A. I remember.

Q. By United States Pictures, 20 per cent?

A. I remember that that contract was made, but I don't remember when I learned that the contract was made. I don't think I knew it prior to the Board meeting at which the matter was discussed.

Q. Well, as a matter of fact, it wasn't presented to the attention of the Board in December of 1947,

(Deposition of Morris Wolf.)

but on August 17, 1950, there was a meeting of the Board of Directors of Warner Bros. Pictures, Inc., a copy of the minutes of which I previously brought to your attention, and at that time the agreement of December 6, 1947, was referred to?

A. That's right.

Q. Now, do you recall that it was also discussed by the Board at that time on August 17, 1950?

A. Well, I remember that the terms of the December agreement was then stated to the Board. I do not remember whether I had been familiar with those terms before that meeting.

Q. Well, now, do you recall that at that time on [784-141] August 17, 1950, another proposed amendment of the basic agreement was presented?

A. Increasing the number of pictures that were to be made and postponing the time for delivery, I remember that.

Q. And was that amendment carried by the Board? A. It was.

Q. Unanimously? A. Yes.

Q. And you, of course, voted for it?

A. I did.

Q. And that vote by you was voluntary and uninstructed by anyone? A. It was.

Mr. Karp: Your witness.

Cross Examination [784-142]

* * * * *

Q. (By Mr. Pottish): Did you have occasion,

(Deposition of Morris Wolf.)

prior to voting on the approval of that agreement, to study the agreement in full? A. No.

Q. Did you have occasion, prior to voting on that agreement, to have investigated the issue whether or not the agreement was the customary agreement between a moving picture company and an independent producer?

A. I have a general knowledge, after many years of being connected with the picture business, of the terms of independent agreement producing contracts, but I did not attempt to compare the individual paragraphs of this agreement with the individual paragraphs of other similar contracts.

* * * * *

Q. I believe you told us that with regard to the agreement of December 6, 1947, that first came to your attention at the meeting of the Board on August 17, 1950?

A. That's right, that is my present recollection.

* * * * *

Q. Do you feel, Mr. Wolf, that if the three Warner brothers at an ensuing election of the Board of Directors desired that you not be placed upon the next slate that you would not run or not be elected as a member of the Board?

A. I would feel that if they opposed my election, I could not force it, of course. [784-146]

* * * * *

Q. My point is, if Mr. Harry Warner alone—he is the president—— A. Yes.

Q. ——were to tell you that he no longer wished

(Deposition of Morris Wolf.)

your firm to represent Warner Bros. Pictures, why, that would be the end of it?

A. It certainly would, but I wouldn't limit that to Mr. Harry Warner. If anybody in authority told me they didn't want my services any more, I would, of course, acquiesce. [784-147]

* * * * *

Q. Well, did you exercise any surveillance over the administration of the basic contract or any of its amendments, particularly with regard to the questions of the items and amounts of overhead that were being charged by United States Pictures or being credited to United States Pictures?

A. No.

Q. You had no idea of what was happening in that regard? A. Not in that regard.

Q. Do you recall whether at the time you approved this agreement in 1945 that you were familiar with the fact that under its terms Warner Bros. could recoup a loss on any one picture only from the profits which might accrue on future pictures, and not from profits which might continue to roll in from all the pictures?

A. If I was familiar with it then, I have forgotten it now.

Q. You have no recollection now as to whether you knew that there was such a provision in this agreement?

A. I do not now have any such recollection.

* * * * * [784-148]